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ABSTRACT

This hearing transcript presents testimony on several House resolutions regarding immigration and citizenship. Two bills propose amending the Immigration and Nationality Act to limit birthright citizenship to persons with citizen or legal resident mothers (HR 705) or to deny such citizenship to children of parents who are not citizens or permanent resident aliens (HR 363). Five joint resolutions propose to amend the Constitution to restrict birthright citizenship to persons with legal resident mothers or fathers (HJ Res 56 and 87); citizen or legal resident mothers (HJ Res 64); a citizen parent at the birth (HJ Res 88); or a citizen parent, lawfully in the United States, or with a lawful immigration status at the birth (HJ Res 93). Witnesses included: (1) several Representatives from the state of California; (2) Representatives from the states of Florida, Hawaii, and Illinois; (3) A former reporter from the "El Paso Times"; (4) university law professors; (5) Barbara Jordan, chair of the U.S. Commission on Immigration Reform; (6) Assistant U.S. Attorney General Walter Dellinger; and (7) a deputy director, Income Maintenance Bureau, San Diego County Department of Social Services. Witnesses testified that smugglers bring pregnant women into the country to give birth so their children are citizens; educational and social welfare benefits for children of illegal aliens were cited as causes. Others argued that because the 14th Amendment grant of birthright citizenship was not meant to apply to children of illegal aliens, a federal statute could end birthright citizenship; others argued that a Constitutional amendment is required to modify birthright citizenship. Appendices contain additional statements, letters, or materials submitted by witnesses. (KDFB)

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SOCIETAL AND LEGAL ISSUES SURROUNDING CHILDREN BORN IN THE UNITED STATES TO ILLEGAL ALIEN PARENTS

ED 400 046

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND CLAIMS

AND THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 705, H.R. 1363, H.J. Res. 56, H.J. Res. 64, H.J. Res. 87, H.J. Res. 88, and H.J. Res. 93

DECEMBER 13, 1995

Serial No. 50

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SOCIETAL AND LEGAL ISSUES SURROUNDING CHILDREN BORN IN THE UNITED STATES TO ILLEGAL ALIEN PARENTS

WEDNESDAY, DECEMBER 13, 1995

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON IMMIGRATION AND CLAIMS, JOINTLY WITH THE SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY,

Washington, DC.

The subcommittees met, pursuant to notice, at 10:07 a.m., the room 2325, Rayburn House Office Building, Hon. Lamar Smith (chairman of the subcommittee on Immigration and Claims) and Hon. Charles T. Canady (chairman of the subcommittee on the Constitution) presiding.

Present from the Subcommittee on Immigration and Claims: Representatives Lamar Smith, Bill McCollum, Elton Gallegly, Carlos J. Moorhead, Sonny Bono, Fred Heineman, Ed Bryant of Tennessee, Barney Frank, John Bryant of Texas, and Xavier Becerra.

Present from the Subcommittee on the Constitution: Representatives Charles T. Canady, Henry J. Hyde, Lamar Smith, Bob Inglis, Barney Frank, John Conyers, Jr., Melvin L. Watt, and José E. Serrano.

Also present: Representatives Patsy T. Mink and Brian P. Bilbray.

Staff present from the Subcommittee on Immigration and Claims: Cordia A. Strom, chief counsel; Edward R. Grant, counsel; George Fishman, assistant counsel; Judy Knott, secretary; and Marie McGlone, minority counsel.

Staff present from the Subcommittee on the Constitution: Kathryn A. Hazeem, chief counsel; Keri D. Harrison, assistant counsel; and Robert Raben, minority counsel.

OPENING STATEMENT OF CHAIRMAN SMITH

Mr. SMITH. We will proceed with our first panel. But first of all, welcome to you all who are here today. I would especially like to thank Charles Canady, who is the chairman of the Subcommittee on the Constitution for cochairing this hearing. Without objection, his opening statement will be made a part of the record. Congressman Canady is at another markup. In fact, there are two other subcommittees of the Judiciary Committee that have markups going on right now, as well as a conference meeting of all Republicans. So it will probably be a little while before we will have much company up here.

The United States is one of the few industrialized countries in the world that grants automatic citizenship to nearly every child born in the country, even the children of illegal immigrants. For instance, England, the originator of this practice, reversed course 14 years ago. Canada is currently considering doing the same. Is it time for us to reconsider our policy of granting birthright citizenship to the children of illegal aliens? That is the question we will address today.

I know this is a sensitive issue. Afterall, our birthright citizenship policy is anchored in the first section of the 14th amendment to the Constitution which states, "All persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States." It was written after the Civil War to guarantee citizenship to those formerly held in bondage and to their descendants.

What is the current impact of this amendment? We will have a witness testify today that smugglers are bringing pregnant women into this country to give birth so that their children are American citizens. About 16 percent of all the births taking place in California each year are to illegal alien mothers. The county of Los Angeles alone estimates that almost 200,000 U.S. citizen children of illegal aliens are living in that area and collecting half a billion dollars a year in AFDC benefits alone. The county estimates that the cost to Los Angeles school districts for primary and secondary education for the citizen children of illegal alien parents is over $600 million a year. That is a total cost to that one county of over $1 billion a year.

Even apart from these quantifiable costs, is citizenship devalued when it is obtained in this way? If birthright citizenship is to be modified, how should it be done? We will hear today from witnesses who will argue that the 14th amendment's grant of birthright citizenship was never meant to apply to the children of illegal aliens, because one, our Founders felt that members of our national community should have the right to choose who will join that community, two, the children of illegal aliens are not subject to the jurisdiction of the United States under the 14th amendment, and three, there really were no illegal aliens in 1868 when the 14th amendment became effective since this was a full 7 years before the first significant Federal immigration statute. If these individuals are correct, then enacting a Federal statute could constitutionally end birthright citizenship.

Others will argue today that the 14th amendment's grant of birthright citizenship was meant to apply to all persons except certain native Americans and the children of diplomats. They will argue that their position was reinforced by the Supreme Court's 1897 ruling in *United States* v. *Wong Kim Ark*. If they are correct, then a constitutional amendment would be required to modify birthright citizenship.

To address these and other issues, we welcome our first panel today, which is comprised of our distinguished colleagues. We have done our best today to follow protocol. The individuals are here in the order in which they introduced legislation governing this particular subject. As has already been pointed out, we are also especially pleased to have a former colleague with us today, Prof. Barbara Jordan, who is also of course a friend from home for me.

[The bills, H.R. 705, H.R. 1363, H.J. Res. 56, H.J. Res. 614, H.J. Res. 87, H.J. Res. 88, and H.J. Res. 93, follow:]

I

104TH CONGRESS
1ST SESSION

H. R. 705

To amend the Immigration and Nationality Act to limit citizenship at birth, merely by virtue of birth in the United States, to persons with citizen or legal resident mothers.

. IN THE HOUSE OF REPRESENTATIVES

JANUARY 26, 1995

Mr. GALLEGLY introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the Immigration and Nationality Act to limit citizenship at birth, merely by virtue of birth in the United States, to persons with citizen or legal resident mothers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LIMITING CITIZENSHIP AT BIRTH, MERELY BY VIRTUE OF BIRTH IN THE UNITED STATES, TO PERSONS WITH LEGAL RESIDENT MOTHERS.

(a) IN GENERAL.—Section 301(a) of the Immigration and Nationality Act (8 U.S.C. 1401(a)) is amended

by inserting before the semicolon the following: ", of a mother who is a citizen or legal resident of the United States".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to persons born after the date of ratification of an article of amendment to the Constitution of the United States that repeals the first sentence of section 1 of the fourteenth article of amendment to the Constitution of the United States.

I

104TH CONGRESS
1ST SESSION

H. R. 1363

To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 1995

Mr. BILBRAY (for himself, Mr. CUNNINGHAM, Mr. PACKARD, Mr. HUNTER, Mr. DOOLITTLE, Mrs. ROUKEMA, Mr. STENHOLM, Mr. BAKER of California, Mr. CALVERT, Mrs. JOHNSON of Connecticut, Mr. MURTHA, Mr. TRAFICANT, Mr. HAYES, Mr. BONO, Mr. MCKEON, Mr. ROHRABACHER, Mr. RIGGS, Mr. HORN, Mrs. "EASTRAND, Mr. SHADEGG, and Mrs. KELLY) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Citizenship Reform Act of 1995".

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SEC. 2. PURPOSE.

It is the purpose of this Act to deny automatic citizenship at birth to children born in the United States to parents who are not citizens or permanent resident aliens.

SEC. 3. CITIZENSHIP AT BIRTH FOR CHILDREN OF NON-CITIZEN, NON-PERMANENT RESIDENT ALIENS.

(a) IN GENERAL.—Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101) is amended by inserting after subsection (c) the following new subsection:

"(d) For purposes of section 301(a), a person born in the United States shall be considered as 'subject to the jurisdiction of the United States' if—

"(1) the child was born in wedlock in the United States to a parent either of whom is (A) a citizen or national of the United States, or (B) an alien who is lawfully admitted for permanent residence and maintains his or her residence (as defined in subsection (a)(33)) in the United States; or

"(2) the child was born out of wedlock in the United States to a mother who is (A) a citizen or national of the United States, or (B) an alien who is lawfully admitted for permanent residence and maintains her residence in the United States.".

(b) CONFORMING AMENDMENT.—Section 301 of such Act (8 U.S.C. 1401) is amended by inserting "(as

defined in section 101(d))" after "subject to the jurisdiction thereof".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to aliens born on or after the date of the enactment of this Act.

104TH CONGRESS
1ST SESSION

H. J. RES. 56

Proposing an amendment to the Constitution of the United States to restrict the requirement of citizenship at birth by virtue of birth in the United States to persons with a legal resident mother or father.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 19, 1995

Mr. BEILENSON introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to restrict the requirement of citizenship at birth by virtue of birth in the United States to persons with a legal resident mother or father.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several

States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. All persons born in the United States, and subject to the jurisdiction thereof, of a mother or father who is a legal resident of the United States and all persons naturalized in the United States are citizens of the United States and of the State wherein they reside. The first sentence of section 1 of the fourteenth article of amendment to the Constitution of the United States is hereby repealed.

"SECTION 2. The Congress shall have power to enforce before this article by appropriate legislation.

"SECTION 3. This article shall apply to persons born after the date of its ratification.".

104TH CONGRESS
1ST SESSION

H. J. RES. 64

Proposing an amendment to the Constitution of the United States to restrict the requirement of citizenship at birth by virtue of birth in the United States to persons with citizen or legal resident mothers.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 26, 1995

Mr. GALLEGLY introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to restrict the requirement of citizenship at birth by virtue of birth in the United States to persons with citizen or legal resident mothers.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States with-

in seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. All persons born in the United States, and subject to the jurisdiction thereof, of mothers who are citizens or legal residents of the United States and all persons naturalized in the United States are citizens of the United States and of the State wherein they reside. The first sentence of section 1 of the fourteenth article of amendment to the Constitution of the United States is hereby repealed.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

"SECTION 3. This article shall apply to persons born after the date of its ratification.".

IA

104TH CONGRESS
1ST SESSION

H. J. RES. 87

Proposing an amendment to the Constitution of the United States regarding citizenship in the United States.

IN THE HOUSE OF REPRESENTATIVES

MAY 3, 1995

Mr. STOCKMAN (for himself, Mr. JONES, Mr. FUNDERBURK, Mrs. CHENOWETH, Mr. BURTON of Indiana, and Mr. SALMON) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding citizenship in the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. Citizens of the United States shall only be persons born to a parent who is a citizen of the United States, persons born within the United States and to a parent who was lawfully present in and subject to the jurisdiction of the United States at the time of that parent's entry into the United States, and all persons naturalized according to the laws of the United States.

"SECTION 2. Nothing in this Constitution shall require either the Congress or the States to provide payments or services to any person who is not a citizen of the United States.

"SECTION 3. No person shall become a naturalized citizen of the United States who is not conversant in the English language, except for persons under the age of five, and who has not sworn allegiance to the United States over and above allegiance to any other polity.

"SECTION 4. Representatives shall be apportioned among the several States according to their respective numbers, counting only the number of citizens of each State.".

IA

104TH CONGRESS
1ST SESSION

H. J. RES. 88

Proposing an amendment to the Constitution of the United States to provide that no person born in the United States will be a United States citizen on account of birth in the United States unless a parent is a United States citizen at the time of the birth.

IN THE HOUSE OF REPRESENTATIVES

MAY 17, 1995

Mr. CALLAHAN (for himself, Mr. STUMP, Mr. EVERETT, and Mr. TRAFICANT) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to provide that no person born in the United States will be a United States citizen on account of birth in the United States unless a parent is a United States citizen at the time of the birth.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States with-

in seven years after the date of its submission to the States for ratification:

"ARTICLE —

"SECTION 1. No person born in the United States after the date of the ratification of this article shall be a citizen of the United States, or of any State, on account of birth in the United States unless the mother or father of the person is a citizen of the United States at the time of the birth.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.".

LA

104TH CONGRESS
1ST SESSION

H. J. RES. 93

Proposing an amendment to the Constitution of the United States to provide that no person born in the United States will be a United States citizen unless a parent is a United States citizen, is lawfully in the United States, or has a lawful immigration status at the time of the birth.

IN THE HOUSE OF REPRESENTATIVES

MAY 25, 1995

Mr. FOLEY (for himself, Mr. HANCOCK, Mr. BAKER of California, Mr. ROHRABACHER, Mr. ROYCE, Mr. BILBRAY, Mr. DOOLITTLE, Mr. EWING, Mr. STUMP, Mr. YOUNG of Alaska, Mrs. CHENOWETH, Mrs. MEYERS of Kansas, Mr. SAXTON, Mr. CHRYSLER, Mr. WILSON, Mr. MCKEON, Mr. CALVERT, Mr. KLUG, Mr. BAKER of Louisiana, and Mr. METCALF) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to provide that no person born in the United States will be a United States citizen unless a parent is a United States citizen, is lawfully in the United States, or has a lawful immigration status at the time of the birth.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the follow-

ing article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. No person born in the United States after the date of the ratification of this article shall be a citizen of the United States, or of any State, on account of birth in the United States unless the mother or father of the person is a citizen of the United States, is lawfully in the United States, or has a lawful status under the immigration laws of the United States, at the time of the birth.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.".

Mr. SMITH. Let us begin. We will start first with the Honorable Representative Elton Gallegly, and then work our way down.

Mr. BECERRA. Mr. Chairman.

Mr. SMITH. Yes, excuse me. I'm sorry.

Mr. BECERRA. Will there be an opportunity for opening statements?

Mr. SMITH. Why don't we make them right now. I just looked around and didn't look up enough. You are recognized.

Mr. BECERRA. Thank you, Mr. Chairman. I appreciate that. I thank the chairman for convening this hearing, and I thank in advance all those who will be testifying.

I would like to just begin by asking a question of the chairman again. I had raised this question last week with regard to Members of Congress being given the opportunity to testify before the committee. Again, I'm not sure what the practice has been. I'm not sure what the protocol will be for this particular subcommittee or the full Committee on the Judiciary. But I understand that Mrs. Patsy Mink, a Representative from Hawaii, had also requested the opportunity to speak before this committee. My understanding is further that she was denied that opportunity. I'd like to see if I can get some clarification from the chairman on that.

Mr. SMITH. Mr. Becerra, let me respond quickly. It is my understanding that she requested the opportunity to testify. We said we would be happy to accept her written testimony, but since she wasn't a member of the Judiciary Committee and we already had nine members who we felt represented both sides very well, we asked her to submit written testimony. To my knowledge, that was something that was acceptable to her. I have not heard otherwise.

Mr. BECERRA. I heard otherwise.

Mr. SMITH. Let me suggest to you to pass on to her, since she didn't contact me directly, that next time she contact me directly.

Mr. BECERRA. I will do so, Mr. Chairman. I believe the chairman in what he says that he himself did not hear otherwise.

I also understand, there's something very disturbing, that evidently it was mentioned that there was no need for her to testify because this is not an issue that involves Asians but only Mexicans having children or babies in this country. I'm not sure if that was said or not. That's hearsay, but I did learn that may have been told to her, that there was no need for her to testify, that enough people were allowed to testify. If that were the case, I would hope that those types of comments would not be injected and given as reasons for disallowing a Member of Congress the opportunity to testify.

Mr. SMITH. OK. Thank you, Mr. Becerra. I would certainly hope that that's not the case. As we both know, hearsay is not admissible. But I'll certainly look into that, and I thank you for calling it to my attention.

Mr. BECERRA. Thank you. If I could just finish then. In terms of any opening presentation, I would just like to say to those who will testify and to those who are here watching, I find it interesting that last week we had a hearing on the issue of immigration, in this case dealing with the issue of allowing people to come into this country who are immigrants, but only for a temporary period to do work and then to leave. There is a proposal these days to provide

a guest worker program, similar to what this country has had in the past, the bracero program, for example, in the 1940's through the 1960's of this century. Where what we would do is allow people to enter the country, provide their labor, and as we heard from the testimony of many of the growers who are requesting this, they are very determined labor, very difficult labor, and apparently very unique labor because of the millions of people unemployed in this country. None of those American citizens who are unemployed could do the work that was necessary in the fields, so it was necessary for us to import people from other countries, temporarily of course, to do the work. I find that very fascinating, that today now we're discussing just the opposite.

Today, not only do we wish to exclude, but we wish to exclude people who by birth become U.S. citizens. I am very interested in seeing the distinction, in learning a little bit more about the distinction, hearing what people think about letting some people come in and do some things in this country, and denying others the right to do what anyone born in this country has had the right to do since as I understand it, the creation of this country.

I know that there are differences as to whether or not the Constitution and the 14th amendment meant to apply it to anyone born in this country in extending citizenship status. I am very interested in hearing that debate. I hope ultimately what we will do is try to do what we think is most practical for this country, and perhaps at some point, we'll consider the humanity of it as well.

So I thank the chairman for this opportunity to make an opening statement. I would hope to see some clarification in terms of the subcommittee's position and practice with regard to allowing members to testify. Thank you.

Mr. SMITH. Thank you, Mr. Becerra. Mr. Gallegly.

STATEMENT OF HON. ELTON GALLEGLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. GALLEGLY. Thank you very much, Mr. Chairman. Thank you for the opportunity to appear before our committee today. I commend the chairman for holding these hearings on this very important issue of birthright citizenship, an issue of critical importance to our entire nation, and particularly, our border States.

Since 1991, I have sponsored legislation to amend our Constitution to abolish the automatic citizenship to the children in this country that are born to illegal alien parents. This proposal was also a key recommendation of the Congressional Task Force on Immigration Reform, a 54-member bipartisan group, which I have had the privilege to chair. This proposal was adopted by the entire task force with only one dissenting opinion. I have long championed this change in the 14th amendment because it is my belief that our current law encourages widespread illegal immigration and costs American taxpayers billions of dollars each year.

I expect the opponents of this change in our citizenship law will decry this proposal as radical. However, far from being radical, such restrictions on citizenship are the norm around the world. Only a handful of countries, Argentina, Canada, and Mexico still grant automatic citizenship. In Canada, the Committee on Citizenship and Immigration last year recommended that this policy be

changed and birthright citizenship be limited to children born in Canada only if one or both of their parents is a permanent resident or Canadian citizen, or in the case of a parent that is a valid Canadian refugee. Nearly every nation in Europe, Africa, and Asia do not permit automatic citizenship to children of illegal immigrants. In fact, both the United Kingdom and even Australia, a country which shares a long immigrant tradition similar to ours, both repealed their U.S.-style citizenship policies during the 1980's.

My proposed amendment is much more limited. It would confer automatic citizenship to children of legal residents as well as citizens, denying it only to the children of illegal alien parents.

This change in our citizenship law is long overdue, as there are a growing number of women who illegally enter the United States for the sole purpose of giving birth to an American citizen. There are a number of reasons for this. First, these children are eligible for Federal, State, and local benefit programs, and having a child is virtually a guarantee against deportation.

In addition, under our current legal immigration system, the citizen child can sponsor their illegal parents or any other close relative for permanent resident status. This powerful incentive for illegal immigration must be eliminated. In Los Angeles County, there are an estimated 250,000 citizen children of illegal alien mothers, all eligible for very generous benefit programs. For the State of California, the estimated welfare and health costs of the children of illegal aliens is estimated to be over $500 million annually. This number does not even include the largest cost of all. That, of course, is the cost of providing a public education.

The costs of this policy are enormous and will continue to skyrocket when you consider that in over two-thirds of all the births in Los Angeles County operated hospitals, the mothers are illegally in this country. In California, with over 31 million residents, over 40 percent of all the births paid for by Medi-Cal, the State Medicaid system, are to illegal alien mothers. In Los Angeles County, the California Department of Health Services estimated that AFDC costs for citizen children rose from $249 million to $461 million between fiscal years 1991 and fiscal year 1994—almost a 100-percent increase in just that one 3-year period. Nationwide, it is difficult to find precise data on the costs attributable to citizen children of illegal aliens. However, just among the school-aged population, it is estimated that 1.3 million children were born in the United States to illegal alien parents.

Some will argue that the reform would violate the spirit of the 14th amendment. That amendment, I must remind my colleagues, was drafted after the Civil War to guarantee that the recently freed slaves did not lose their citizenship rights based on action by the States. When that amendment was enacted in 1868, there were no illegal immigrants in the United States because there were no immigration laws until 1875.

Other advocates of maintaining the status quo argue that reforming citizenship policies would create a permanent subclass of residents as is found in some other parts of the world. I reject this analogy, because our nation continues to encourage assimilation and citizenship of those who are here legally. Our proposal only focuses on illegal immigrants.

Mr. Chairman, this Congress is finally taking the necessary steps to regain control of our borders and eliminate the access of illegal immigrants to public benefits. However, the lure of benefits must be attacked at all levels, including illegal aliens who knowingly manipulate our citizenship laws to receive these benefits.

Mr. Chairman, poll after poll shows that the solid majority of Americans, liberal, moderate and conservative, believe that reforms are necessary. Because immigration reform is inherently an emotional issue, it is incumbent on all of us to debate this issue based on the facts and not on emotion. Thank you, Mr. Chairman.

[The prepared statement of Mr. Gallegly follows:]

PREPARED STATEMENT OF HON. ELTON GALLEGLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you for the opportunity to appear before you today. I commend Chairman Smith for holding these hearings on the issue of birthright citizenship, an issue of critical importance to our entire nation and, in particular, our border states.

Since 1991, I have sponsored legislation to amend our Constitution to abolish automatic citizenship to children born in this country to illegal alien parents. This proposal was also a key recommendation of the Congressional Task Force on Immigration Reform, a 54-member bi-partisan group which I chair. This proposal was adopted by the entire Task Force with only one dissenting opinion.

I have long championed this change to the Fourteenth Amendment because it is my belief that our current law encourages widespread illegal immigration and costs American taxpayers billions of dollars each year.

I expect that opponents of this change in our citizenship law will decry this proposal as radical. However, far from being radical, such restrictions on citizenship are the norm around the world. Only a handful of countries—Argentina, Canada and Mexico—still grant automatic birthright citizenship. And in Canada, the Committee on Citizenship and Immigration last year recommended that this policy be changed and birthright citizenship be limited to children born in Canada only if "one or both of their parents is a permanent resident or Canadian citizen" or in the case of a parent that is a valid Canadian refugee.

Nearly every nation in Europe, Africa and Asia do not permit automatic citizenship to children of illegal immigrants. In fact, both the United Kingdom and even Australia, a country which shares a long immigrant tradition similar to ours, both repealed their U.S. style citizenship policies during the 1980's. My proposed amendment is much more limited. It would confer automatic citizenship to children of legal residents as well as citizens, denying it only to children of illegal alien parents.

This change in our citizenship laws is long overdue as there are a growing number of women who illegally enter the United States for the sole purpose of giving birth to an American citizen. There are a number of reasons for this.

First, these children are eligible for federal, state and local benefit programs, and having a child is a virtual guarantee against deportation. In addition, under our current legal immigration system, the citizen child can sponsor their illegal parents, or any other close relative, for permanent resident status.

This powerful incentive for illegal immigration must be eliminated. In Los Angeles County, there are an estimated 250,000 citizen children of illegal alien mothers, all eligible for generous benefit programs. For the state of California, the estimated welfare and health costs of the children of illegal aliens is estimated to be over $500 million annually. And this number does not even include the largest cost of all—providing a free public education.

The costs of this policy are enormous and will only skyrocket when you consider that over two-thirds of the births in Los Angeles county's public hospitals are to illegal alien parents. In California, a state with over 31 million residents, 40% of all births paid by Medi-Cal—the state Medicaid system—are to illegal alien mothers.

In Los Angeles County, the California Department of Health Services estimated that AFDC costs for citizen children rose from $249 million to $461 million between fiscal year 1991 and fiscal year 1994. This represents a staggering 85% increase in just three years.

Nationwide, it is difficult to find precise data on the costs attributable to citizen children of illegal aliens. However, just among the school-age population, it is estimated that 1.3 million children were born in the United States to illegal alien parents. Some will argue that the reform would violate the spirit of the 14th Amend-

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ment. That amendment was drafted after the Civil War to guarantee that recently freed slaves did not lose their citizenship rights based on action by the states. When that amendment was enacted in 1868, there were no illegal immigrants in the United States because there were no immigration laws until 1875.

Other advocates of maintaining the status quo argue that reforming citizenship policies would create a permanent subclass of residents as is found in some parts of the world. I reject that analogy because our nation continues to encourage assimilation and citizenship of those who are here legally. Our proposal only aims at illegal immigrants.

Mr. Chairman, this Congress is finally taking the necessary steps to regain control of our borders and eliminate the access of illegal immigrants to public benefits. However, the lure of benefits must be attacked at all levels, including illegal aliens who knowingly manipulate our citizenship laws to receive these benefits.

Current law bestows citizenship on a kind of technicality, based more on logistics and timing than on roots, community or legality. This is clearly inappropriate. An act of geography should not be interpreted as an act of jurisprudence.

Mr. Chairman, poll after poll shows that a solid majority of Americans—liberal, moderate and conservative—believe that reforms are necessary. And because immigration reform is inherently an emotional issue, it is incumbent upon all of us to debate this issue with facts, not with emotions.

Mr. SMITH. Mr. Gallegly, thank you. Let me say for those who don't know that, you of course are a member and a very active member of the Immigration Subcommittee. So we welcome you back up here at your convenience.

Let me also announce that regrettably, we have no timekeeper here. You all are used to seeing a red light after 5 minutes. That will not be the case. So I am going to have the responsibility of hitting the gavel at 5 minutes, according to a timekeeper that we have up here. So I would ask for your indulgence in trying to limit your remarks to 5 minutes. Not just this panel, but subsequent panels as well.

Congressman Brian Bilbray of California.

STATEMENT OF HON. BRIAN P. BILBRAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. BILBRAY. Thank you, Mr. Chairman. I appreciate the chance to be able to testify today and appreciate you having us.

Mr. SMITH. Brian, let me interrupt you just for a minute. I want to introduce Congressman Serrano, who just joined us. He is a member of the Constitution Subcommittee as well. José, we welcome you. And Bill McCollum of Florida, who has just joined us as well.

Excuse me, Brian.

Mr. BILBRAY. Thank you, Mr. Chairman. Mr. Chairman, this issue is of great significance to me as someone who grew up along the Mexican border dealing with the consequences of an open border. Specifically, as a San Diego county supervisor, for the past 10 years, I addressed the strains which automatic citizenship placed on our system.

The Citizenship Reform Act of 1995 is based on my lifelong experience. I have introduced the Citizenship Act, which denies automatic citizenship to children of illegal aliens who were born on U.S. soil. It makes these changes statutorily by amending the Immigration and Naturalization Act. H.R. 1363 has 33 bipartisan cosponsors, which includes Congressman Jay Kim, who I would like to note is a legal immigrant to the United States.

The current interpretation of the law allows children of illegal parents, born on U.S. soil to automatically be granted U.S. citizen-

ship. Over 96,000 babies of illegal aliens were born in California in 1992 alone. These children then qualify for the benefits of Medicaid, AFDC, WIC, SSI. This is an insult to legal aliens such as my mother, who observed all our immigration laws and came through the proper channels to the United States.

There is no basis of law or Supreme Court ruling for the current interpretation. The 14th amendment and the debate surrounding it is very clear in its assertion that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. In addition, there has been no Supreme Court ruling on a case dealing with children of illegal aliens.

Now, Mr. Chairman, the purpose of the 14th amendment was twofold. One, to transform the relationship of citizenship from primary at State, secondary at Federal to primary Federal, secondary to the States. It also included a major issue that Senator Howard, the author of the amendment, stressed. That is, the rights and responsibilities of Congress to be able to intervene on issues of citizenship. This was a very, very strong component.

Now, there are those who will argue that British common law was reinforced by the 14th amendment to overturn the *Dred Scott* decision, which has some merit in debate. I will refer to the fact that the British common law does also address this issue. Congress' power under the 14th amendment is quite clear under section 5. My bill addresses the issue that Congress has the responsibility and authority to define who is and who is not a citizen.

Congress has employed these constitutional powers by legislating and clarifying citizenship status for native Americans. After passage of the 14th amendment, Congress acted in 1870 with the Winnebago Indians in Minnesota, by permitting them to apply for citizenship with condition that the Indians cease to be members of the tribe and their lands were to be subject to taxation. The Indian Territorial Nationalization Act in 1890 broadened the earlier Act by allowing any member of any Indian tribe or nation residing in Indian territory to apply for citizenship. From 1854 until 1924, citizenship was a common Government incentive to encourage assimilation of Indians.

Congress' authority to nationalize Indians was also sustained by the courts in the case of *Elk* v. *Wilkins* in 1884. The *United States* v. *Celestine* in 1909. Now Indians were perceived to owe allegiance to their tribe and were therefore not under the obedience of the United States. Indians were only to be granted U.S. citizenship by act of Congress.

Now today, those who are in the United States illegally are clearly not subject to the jurisdiction thereof. Or rather, obeying the Federal Government as illustrated by the fact that they have chosen to violate our immigration laws. But more importantly, violate our national sovereignty.

If illegal aliens have babies on U.S. soil they, according to precedent, must demonstrate obedience to the law as a condition for that automatic citizenship. Historical record has demonstrated, Mr. Chairman, repeatedly in the case involving Indians, that citizenship could only be achieved through congressional action, and not through automatic citizenship under the 14th amendment. I feel

that it is quite clear that Indians and illegal aliens fall under the same category, and that it is up to Congress to determine it.

The *McKay* v. *Campbell* case specifically said that to be a citizen of the United States by reason of birth, a person must not only be born within the territorial limits, but he also must be born subject to the jurisdiction. That, is in the power and obedience of the United States. Thus, I think that clarifies the perimeter of citizenship pretty strongly.

The case of the *U.S.* v. *Wong Kim Ark,* in 1897 is pointed to opponents of my case as being proof that we need a constitutional amendment. However, this case only referred to legal residents. The parents were legal at the time. Under the majority opinion of the court, the Justices stated that the children of foreign ambassadors for alien enemies born during their hostile occupation of part of the King's domain, were not naturally born subjects because they were not born within the allegiance, the obedience, the power, or within the jurisdiction of the King.

Now, Mr. Chairman, I think it comes down to the fact that there are those that are going to say that obedience is not a condition. Under British common law, we can go back and say that. But let me just close with this statement. In the *McKay* v. *Campbell* case, I think the court said it quite clearly about what public opinion, no matter how long it stands, has to do with legal court. In this case in 1897, the court concluded that public opinion is not any authority on a point of law. The current misinterpretation of our citizenship law does not relieve the Congress of the constitutional responsibility to right this wrong. I ask you to address this issue. We can't walk from it. It is time for us to right this wrong. Again, I thank you for the chance to testify before this committee.

[The prepared statement of Mr. Bilbray follows:]

PREPARED STATEMENT OF HON. BRIAN P. BILBRAY A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Good morning, Chairman Smith Chairman Canady and members of the Subcommittees. I would like to extend my gratitude to you for holding this important hearing on the issue of automatic United States citizenship. As you know, this issue is of great significance to me, personally, because I grew up along the Mexican border, dealing with the consequences of an open border, which are exacerbated by the strains which automatic citizenship places on the system. Based on this life-long experience, I have introduced "The Citizenship Reform Act of 1995," H.R. 1363, which denies automatic citizenship to children of illegal aliens who are born on U.S. soil. My legislation makes this change statutorily by amending the Immigration and Nationality Act. H.R. 1363 has 33 bi-partisan cosponsors, including Representative Jay Kim, who, it is important to note, worked within the system to legally immigrate from Korea.

The current interpretation of the law allows children of illegal alien parents born on U.S. soil to automatically be granted U.S. citizenship. As I have stated previously before this committee over 96,000 babies of illegal aliens were born in California in 1992. These children then qualify for benefits including Medicaid AFDC, WIC and SSI. It is my view that this is an insult to legal aliens, such as my mother, who observed our immigration laws and came to the U.S. through the proper channels.

However, the most striking fact about this issue is that there is no basis of law or Supreme Court ruling for the current interpretation. As I will explain further, the Fourteenth Amendment and the debate surrounding it is very clear in its assertion that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States". In addition, there has been no Supreme Court ruling on a case dealing with the children of illegal aliens.

The Fourteenth Amendment to the Constitution was consistent with British common law and reconfirmed the consensual basis for citizenship. The Amendment was crafted in such a way that if a person was granted federal citizenship, they were

automatically a citizen of their state of residence. The intent of the Fourteenth Amendment was to grant citizenship for newly freed slaves, and to supersede the *Dred Scott* decision which stood in violation of the common law view of citizenship.

However, the 1866 Senate debate on the Amendment centered around the citizenship status of American Indians. During the Senate debate, Senator Howard from Michigan stated "Indians born within the limits of the U.S. and who maintain their tribal relations, are not, in the sense of the amendment, born subject to the jurisdiction." Senator Trumbull, the Chairman of the Judiciary Committee, posed this question, "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anyone else. That is what it means." This was reaffirmed by the Senate Judiciary Committee in a report it issued on the status of Indian citizenship. The report found them not to be citizens, because they were not "under the jurisdiction of the United States" at the time the amendment was adopted. The Committee's opinion was that "the Fourteenth Amendment to the Constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States."

Section 5 of the Fourteenth Amendment states that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress has employed this Constitutional power by enacting legislation which clarified the citizenship status of American Indians. After passage of the Fourteenth Amendment. Congress issued the "Act of July 15, 1870," in which a Winnebago Indian from Minnesota was permitted to apply for citizenship, with the condition that the Indian cease to be a member of the tribe, and his land be subject to taxation. the "Indian Territory Naturalization Act" of May 2, 1890 broadened the earlier act by allowing any member of any Indian tribe or nation residing in Indian Territory to apply for citizenship. From 1854 until 1924, citizenship was a common government incentive to encourage the assimilation of Indians. Congress' authority to naturalize Indians has been sustained by the courts in the cases of *Elk* v. *Wilkins* in 1884 and *United States.* v. *Celestine* in 1909.

Indians were perceived to owe allegiance to their tribe, and were therefore, not under the "obedience" of the United States. Indians could only be granted U.S. citizenship by an act of Congress in which they had to renounce their allegiance to their tribe. Today, those that are in the United States illegally are clearly not "subject to the jurisdiction thereof" or rather obeying the federal government, as illustrated by the fact that they have chosen to violate our immigration laws. If illegal aliens have babies on U.S. soil they, according to precedent, must demonstrate obedience to our laws. This, as the historical record has demonstrated repeatedly, in cases involving Indians, can be achieved only through acts of Congress. Indians were not considered automatic citizens; by the same logic, therefore, children of illegal aliens should not receive automatic citizenship.

There have been a number of notable court rulings addressing the issue of citizenship. A federal district court in Oregon rules in the 1871 case of *McKay* v. *Campbell* that the Fourteenth Amendment was merely declaratory of the common-law rule of citizenship. The case involved a plaintiff whose father was a British subject and whose mother was a Chinook Indian. It was ruled by the Court that Indians born in tribal allegiance were not born in the U.S., and subject to the jurisdiction thereof. The Court ruled that "to be a citizen of the U.S. by reason of his birth, a person must not be born within its territorial limits, but he also must be born subject to its jurisdiction—that is, in its power and obedience". Under the obedience means that they are obeying U.S. laws. If someone enters the U.S. illegally they are violating U.S. laws. This basic disobedience of U.S. immigration law, negates the illegal alien as being "subject to the jurisdiction of the United States."

The court also ruled that it is the exclusive right of Congress to grant citizenship. The plaintiff was not "born a citizen of the United States, and can only become one by complying with the laws for the naturalization of aliens . . . But that is a matter within the exclusive cognizance of Congress". Under this precedent, Congress may act on the granting or narrowing of U.S. citizenship.

The finding of *McKay* v. *Campbell* were upheld in 1884 by the Supreme Court case of *Elk* v. *Wilkins*. Here the Court held that an Indian living in the city of Omaha, apart from his tribe, was not a citizen under the Fourteenth Amendment. The Court relied on the Fourteenth Amendment's requirement that a citizen be born "subject to the jurisdiction" which it found not to apply to Mr. Elk, because he was born under tribal authority.

The Court ruled, and I quote, "the phrase 'subject to the jurisdiction thereof' embraced only those who were subject to the complete jurisdiction of the United States, which could not be properly said of Indians in tribal relations. But it was distinctly announced by the friends of the amendment that they intended to include in the granting of national citizenship to Indians who were within the jurisdiction of the

states, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States." In its opinion, the Court quoted Senator Trumbull from the original Senate debate of the Fourteenth Amendment as saying, "It is only those who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens."

Supreme Court Justice Cooley in the *Elk* v. *Wilkins* case, referred to the definition of national citizenship as contained in the Fourteenth Amendment, saying that "By the express terms of the amendment, persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have residence in this country, more or less permanent, for business, instruction, or pleasure, are not citizens." He went on to say that Indians are "subject to the jurisdiction" of the United States only in a much qualified sense; and it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected the render to their tribal head, that they should be vested with the complete rights—or, on the other hand, subjected to the full responsibilities—of American citizens."

In the case of the *United States* v. *Wong Kim Ark*, the plaintiff, Mr. Ark was born in San Francisco in 1873. His parents were legal immigrants from China and were "domiciled residents of the United States." The Court held that Mr. Ark was a citizen of the United States even through his parents owed allegience to the Emperor of China.

This case was based upon the fundamental principle of the British common law. Supreme Court Justice Gray, discussed this principle in the Court's opinion, that "the children, born within the realm, of foreign ambassador's, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because [they were] not born within the allegiance, the obedience, or the power, or, as would be said at this day within the jurisdiction of the king." The Wong Kim Ark case was consistent in this regard with British common-law.

However, the major distinction with this case was that Wong Kim Ark's parents had come to America legally. The Supreme Court has never ruled on the case of a child or someone who had come to America illegally. It has only ruled on the narrow factual case of children of legal immigrants.

Along with the benefits of being a citizen of the United States come certain responsibilities. Included in the oath of allegiance, the candidate pledges to defend the Constitution and laws of the United States of America against all enemies foreign and domestic; bear true faith and allegiance; and bear service in the armed forces. By the same token, non-citizens are not eligible for jury duty or eligible to vote. This, issue of the responsibilities of a citizen is called into question by a number of different scenarios. If a child born in the United States to a Mexican citizen who is in the United States illegally is called upon to serve in the U.S. military, would that person be obligated to serve? Because Mexico allows their citizens to have dual citizenship, would it not be possible for the individual to claim that he or she does not have to serve in the U.S. military because he owes allegiance to Mexico? I, as a child of a legal immigrant, could not claim that I did not want to serve in the U.S. military because my mother became a U.S. citizen by obeying by the laws of the United States. This is merely a hypothetical situation, however, it brings into question the complexities of dual citizenship.

The above mentioned is the historical context and some theoretical questions; in the present, there is the very tangible question of cost to local counties and states that bear the brunt of the burden of caring for the children of illegal aliens. The nearly 96,000 babies who were born to undocumented women covered by the Medi-Cal program in 1992 represented an 85 percent increase over three years. In 1992 alone, the cost to California taxpayers was more than $230 million in medical bills. In my county of San Diego, the county estimates that the total cost for undocumented immigrants from 1992 to 1993 was over $64 million. These are costs that counties and states just simply cannot afford, especially when a large percentage of these costs are incurred outside the parameters of any true basis of law or Supreme Court ruling.

Let me be clear in one essential point. I do not blame young mothers for wanting the best health care possible for themselves and their babies, or to give their children the option of a better life in America. It is by no fault of their own that the United States' failed immigration policies have resulted in their being encouraged to come into this country illegally. However, their plight or predicament does not give them a free pass to circumvent those who are trying to work within the system to come to America legally. By the same token, it is also not the fault nor the responsibility of the American taxpayer, who is paying for these costs through less benefits and higher taxes.

Although a number of my colleagues advocate a constitutional amendment to correct this interpretation of the law, it is my view that this would be superfluous. The fact that the Supreme Court has never ruled on this issue, coupled with the difficulty of passing an amendment to the Constitution, gives strength to my argument of implementing this change statutorily. The Congress has demonstrated its authority to act under Section 5 of the Fourteenth Amendment by granting citizenship to American Indians. The Congress' elected status and our position as co-equal branches of government, gives our actions great weight in the Supreme Court. Therefore it is under Congress' purview to define more clearly the intention of the framers of the Fourteenth Amendment as to who is and who is not a citizen of the United States. We should exercise this purview by amending the Immigration and Naturalization Act. Should this be found to be unconstitutional, then, and only then would a Constitutional amendment be necessary. However, until such time, it is clearly and completely within the authority of the Congress of the United States to further define citizenship laws of our great country.

Again, I would like to thank you, Chairman Smith, Chairman Canady and the members of the Subcommittees for allowing me the opportunity to testify before you this morning and I look forward to an open and honest debate on this issue.

Mr. SMITH. Thank you, Mr. Bilbray. Let me note that we have been joined by Congressman Fred Heineman and Congressman Ed Bryant, as well as the chairman of the Judiciary Committee, Henry Hyde. I appreciate you all being here.

Congressman Luis Gutierrez, you are recognized. You are here as a representative of the Hispanic Caucus.

STATEMENT OF HON. LUIS V. GUTIERREZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. GUTIERREZ. Thank you very much, Mr. Chairman. Mr. Chairman, I want to thank you for the opportunity to testify on behalf of the Hispanic Congressional Caucus on various proposals to deny U.S. citizenship to children born in our nation to noncitizen parents. I strongly believe that these proposals, both the constitutional amendments and the statutory method are remarkably shortsighted, divisive, and completely unwarranted attacks both on our Constitution and on the core values that we as Americans embrace, fight for and strive to live by every day.

I could devote my entire testimony to recounting the 130 years of legal precedent detailing why the proposals of Mr. Stockman, Mr. Gallegly, Mr. Bilbray, and Mr. Foley are unconstitutional or counter to the intent of the 14th amendment, but I think this testimony is best left to a long line of legal experts who are very troubled by these proposals. Let me instead consider the basic question. Should we deny citizenship to an entire group of people, people born in America?

Let me answer by quoting a Republican. A Republican leader who also had to consider whether we should deny citizenship to an entire group of people born in America. A Republican leader who faced a decision how to respond to a Supreme Court that wanted to deny these rights. How did that Republican leader respond to the idea that America should deny citizenship to an entire group of people? He said that idea, "Does obvious violence to the plain, unmistakable language of the Declaration of Independence. It leaves the Declaration assailed and sneered at and construed and hawked at and torn until if its framers could rise from their graves, they could not recognize it at all." That Republican was Abraham Lincoln.

The idea was Justice Roger Taney's *Dred Scott* decision, which denied the right of citizenship to all blacks merely because they were black. Our greatest president answered that idea with courage. That Republican faced with exclusion, chose unity. Lincoln took a stand, a stand that our Nation should not abandon the words of the Declaration of Independence, the idea that "We hold these truths to be self-evident, that all men are created equal."

Now the proposals before this committee make a very different declaration, that today, "we hold these truths to be self-evident that all men except those born to noncitizens are created equal." The proposals we consider today, that where Lincoln chose brotherhood, we should choose division. These bills, no matter how many legal niceties their sponsors would like to give, seek to accomplish one basic goal, undermining our Nation's historical and fundamental commitment to equality for all people.

But Lincoln was right. Denying citizenship to an entire group of people at our whim leaves the Declaration of Independence assailed. It leaves the Constitution frayed. It steals from the American people a principle that is at the foundation of what makes our nation great, a commitment to equality.

Unfortunately, the stab at the heart of the Constitution and the Declaration of Independence is wrapped in rhetoric concerning a serious national problem. Sponsors of these proposals want us to believe that by punishing children our Nation's immigration problems will somehow magically disappear. Unfortunately, absolutely no evidence exists that supports this claim.

First and most obviously, adoption of any of these bills would mainly serve to create hundreds of thousands of more undocumented residents, and continue to create more every time a child was born to a noncitizen. The very people who want fewer noncitizens will be doing nothing except add more and more to our Nation. And more significantly, widen the current gulf of resentment and animosity between Americans based on their immigration status.

Second, proponents of this idea often talk of the costs associated with illegal immigration. But those costs are in no way addressed by these proposals. In fact, no study has ever suggested that these plans would lessen the number of undocumented residents born in our nation.

Finally, these proposals would threaten the health of mothers and children across our Nation. This legislation would turn health care professionals into INS agents and discourage mothers from seeking proper medical care before their children are born. And not only mothers who are not citizens, any mother or parent who might not look like a citizen would also be subject to questioning or suspicion.

I would ask my friends on the committee and here in Congress, do I look like a citizen? I wonder if they would think my wife looks like a citizen. I wonder if the official at the hospital, who under these proposals would be responsible for determining what children are born to criminals and what children are born innocent, would they have looked at my wife and two beautiful daughters, "Do they look like citizens?" I can make a very confident guess that my wife, who is a U.S. citizen, whose parents and grandparents are U.S.

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citizens, would have attracted a lot more attention than the wives of many of my colleagues who are here in Congress today.

These are just a few brief examples of how unworkable and ineffective the proposals before us are. The Congressional Hispanic Caucus is eager to work for responsible, reasonable and constitutional ways to combat illegal immigration. We are not willing to traffic in discrimination and misery. That is what these proposals, I believe, would mean. They mean real human suffering, suffering that will be experienced mainly by children.

So if our basic American decency, if respect for our Constitution and our Declaration of Independence are not good enough reasons for us to reject these bills, let me suggest one other source. In the Bible, in Ezekiel, it is written, "the son shall not bear the iniquity of the father." Yet that burden is precisely what these amendments force upon the children of noncitizens. This subcommittee must take a stand. Will we punish children because of the actions of their parents? Will we trade the words and wisdom of Thomas Jefferson, Abraham Lincoln for the sound bites and headlines that an entirely ineffective policy brings? Will we so casually abandon our national commitment to equality?

The committee can and should answer no. Because if we answer yes, not just immigrants or noncitizens will be losing something. Every American will be losing something. We will be losing a little more of our national identity, a little more of our national character, a little more of what it means to be an American to say with pride we live in the greatest Nation in the world, a Nation "conceived in liberty and dedicated to the proposition that all men, that all men are created equal." Please reject these proposals. Thank you for the opportunity to testify.

[The prepared statement of Mr. Gutierrez follows:]

PREPARED STATEMENT OF HON. LUIS V. GUTIERREZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I thank you for the opportunity to testify on behalf of the Congressional Hispanic Caucus on the various proposals to deny U.S. citizenship to children born in our nation to non-citizen parents.

I strongly believe that these proposals—both the Constitutional Amendments supported by Representative Gallegly and others—and the statutory method supported by Representative Bilbray—are remarkably short-sighted, divisive and completely unwarranted attacks both on our Constitution and on the core values that we as Americans embrace, fight for and strive to live by every day.

Our Constitution is clear on whether the children of non-citizens are citizens of our nation. The 14th Amendment reads:

"All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside."

My colleagues suggest that it is time to take that right away.

Now, I could devote my entire testimony to recounting 130 years of legal precedent detailing why the proposals of Mr. Stockman, Mr. Gallegly, Mr. Bilbray and Mr. Foley are unconstitutional or counter to the intent of the 14th Amendment.

But I think this testimony is best left to the long line of legal experts who are very troubled by these proposals.

Let me instead consider the basic question.

Should we deny citizenship to an entire group of people—people born in America?

Let me answer by quoting a Republican.

A Republican leader who also had to consider whether we should deny citizenship to an entire group of people, born in America.

A Republican leader who faced a decision—how to respond to a Supreme Court that wanted to deny those rights.

How did that Republican leader respond to the idea that America should deny citizenship to an entire group of people?

He said that idea, quote, "does obvious violence to the plain, unmistakable language of the Declaration of Independence. It leaves the Declaration assailed, and sneered at, and construed, and hawked at, and torn—till, if its framers could rise from their graves, they could not at all recognize it."

That Republican was Abraham Lincoln.

The idea was Justice Roger Taney's Dred Scott decision—which denied the right of citizenship to all blacks, merely because they were black.

Our greatest President answered that idea with courage. And because he did, the 14th Amendment was born, and America became a greater, stronger nation.

That Republican, faced with exclusion, chose unity.

Lincoln took a stand—a stand that our nation should not abandon the words of the Declaration of Independence—the idea that "we hold these truths to be self-evident—that all Men are created equal."

Now, the proposals before this committee make a very different declaration—that today "we hold these truths to be self-evident—that all Men—except those born to non-citizens—are created equal."

The proposals we consider today suggest that where Lincoln chose brotherhood, we should choose division.

These bills—no matter how many legal niceties and political arguments their sponsors would like to give—seek to accomplish one basic goal—undermining our nation's historic and fundamental commitment to quality for all people.

Lincoln was right—denying citizenship to an entire group of people at our whim leaves the Declaration of Independence assailed.

It leaves the constitution frayed.

And it steals from the American people a principle that is at the foundation of what makes our nation great—a commitment to equality.

Unfortunately, this stab at the heart of the Constitution and the Declaration of Independence, is wrapped in rhetoric concerning a serious national problem.

Sponsors of these proposals want us to believe that by punishing children our nation's immigration problems will somehow magically disappear.

Unfortunately, absolutely no evidence exists that supports these claims.

In fact, even if we were willing to abandon our historic commitment to equality and pass this bill, we would only worsen our immigration problem.

First—and most obviously—adoption of any of these bills would mainly serve to create hundreds of thousands more undocumented residents, and continue to create more every time a child was born to a non-citizen.

The very people who now want fewer non-citizens will do nothing except add more, and more, to our nation—and more significantly, widen the current gulf of resentment and animosity between Americans based on their immigration status.

Second, proponents of this idea often talk of the costs associated with illegal immigration. But those costs are in no way addressed by these proposals—in fact, no study has ever suggested that this plan would lessen the number of undocumented residents in our nation.

Finally, these proposals would threaten the health of mothers and children across our nation. This legislation would turn health to care professionals into INS agents and discourage mothers to seek proper medical care before their children are born.

And not only mothers who are not citizens. Any mother, or parent, who might not look like a citizen would also be subject to questioning or suspicion.

I would ask my friends Mr. Bilbray or Mr. Stockman, Do I look like a citizen? I wonder if you would think my wife looked like a citizen?

I wonder if the official at the hospital—who under your proposals would be responsible for determining what children are born criminals and what children are born innocent—would have thought my wife looked like a citizen when she gave birth to our two wonderful daughters?

I can make a very confident guess that my wife—who is a U.S. citizen—whose parents and grandparents are U.S. citizens—would have attracted a lot more attention than the wives of any of my colleagues who have introduced these bills.

These are just a few, brief examples of how unworkable and ineffective the proposals before us are.

The Congressional Hispanic Caucus is eager to work for reasonable and constitutional ways to combat illegal immigration.

But we are not willing to traffic in discrimination and misery.

And that is what these proposals mean.

They mean real, human suffering—suffering that will be experienced mainly by children.

So if our basic American decency, if respect for our Constitution and Our Declaration of Independence are not good enough reasons for us to reject these misguided bills, then let me suggest one other source.

In the Bible, in Ezekiel it is written, "the son shall not bear the iniquity of the father."

The son shall not bear the iniquity of the father.

Yet that burden is precisely what these amendments force upon the children of non-citizens.

This Subcommittee must take a stand.

Will we punish children because of the actions of their parents?

Will we trade the words and wisdom of Thomas Jefferson and Abraham Lincoln for the sound bites and headlines that an entirely ineffective policy brings?

Will we so casually abandon our national commitment to equality?

This subcommittee can, and should, answer no.

Because if we answer yes, not just immigrants or non-citizens will be losing something.

Every American will be losing something.

We'll be losing a little more of our national identify, a little more of our national character, a little more of what it means to be an American—to say, with pride, we live in the greatest nation in the world, a "nation, conceived in liberty and dedicated to the proposition that all men—that all men—are created equal."

Please, reject these proposals.

Thank you for the opportunity to testify.

Mr. SMITH. Thank you, Mr. Gutierrez. Congressman Tony Beilenson. Yes, Sonny.

Mr. CALLAHAN. Excuse me, Mr. Chairman. My foreign operations bill is coming up on the floor now. I would just like to respectfully ask the committee that during this process they also consider my bill, which is H. Res. 88, which is the bill that denies citizenship even to legal aliens who come here solely for the purpose of having a child here in the United States.

Mr. SMITH. OK. Sonny, thank you. If you want, I'm sure the rest of the panel wouldn't object if we went straight to you if you want to make a longer statement.

Mr. CALLAHAN. I appreciate it, but the Rules Committee is bringing my bill up and I've got to go there. But mine simply says that unless the child has a parent who is a legal citizen, he or she can not gain citizenship automatically.

STATEMENT OF HON. ANTHONY C. BEILENSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. BEILENSON. Thank you very much, Mr. Chairman. Since I am going to leave out a good portion of my statement, perhaps you'll include the full statement in the record.

Mr. Chairman, I appreciate this opportunity to come and testify before your subcommittee in support of denying automatic birthright citizenship to U.S. born children of illegal immigrants. Although your opening comments and those subsequent ones of my friend and colleague, Mr. Gallegly, pretty much cover the waterfront, I'll add a few things if I may. As I suggested just a moment earlier, Mr. Chairman, perhaps my full statement could be included in the record.

Because it appears to be necessary—I hope it's not, perhaps it's not; maybe our friend from San Diego is correct that it can be done by statute, and that's fine, we should try that. But many of us have been led to believe in looking at this quite carefully over the past few years that it appears to be necessary to amend the 14th amendment of the Constitution to achieve that goal. Because of that, I too have introduced a proposed constitutional amendment, H.J. Res. 56, for that purpose. This particular proposal, very similar to Mr. Gallegly's, would provide that automatic U.S. citizenship

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for persons born in this country will be granted only to the children of citizens and persons with a legal resident mother or father.

The issue of birthright citizenship is of course one of the most difficult and emotional issues in the debate over controlling illegal immigration. We are a Nation that has taken great pride in expanding the civil rights of groups of people through the years. The notion of denying an existing right to any class of people, no matter how sensible it may be, is something that goes against our nature as Americans. Furthermore, many of us have such deep respect for the Constitution that we are reluctant to support amending it, except for the most compelling of reasons.

However, the situation that we are addressing—the automatic conferring of citizenship on children of people who have entered our country in violation of our laws—is so unfair—and unintended when the 14th amendment was first adopted—that it does provide, I believe, one of those rare compelling reasons for amending the Constitution. As you know, and as you have been reminded today, the 14th amendment, which confers citizenship on all persons born in the United States, was adopted shortly after the Civil War in order to ensure that benefits and privileges of citizenship for African-Americans, for the newly freed slaves, which they had been denied by the Supreme Court's *Dred Scott* decision.

Because the United States did not limit immigration in 1868 when the 14th amendment was ratified, and therefore there were no illegal immigrants at that time, the issue of citizenship for children of illegal immigrants obviously was nonexistent. Thus, the granting of automatic citizenship to these children is a totally inadvertent and unforeseen result of the amendment. This grant of citizenship to U.S. born offspring is one of several factors that make illegal immigration attractive. Mr. Gallegly spoke to that, and I'll skip over my remarks on that.

However much the granting of citizenship to offspring serves as a strong incentive for illegal immigration, the fact remains that it serves as a reward for entering this country in violation of our laws. That is fundamentally unfair. While millions of people around the world wait patiently, sometimes for many years, to immigrate legally to the United States, those individuals who manage to circumvent our immigration laws are rewarded by having their children granted the greatest benefit that we as a nation can confer on individuals. We are in effect, Mr. Chairman, saying that if you break our laws and if you are successful in sneaking across our borders and you have children here, we will reward you by granting citizenship to those children.

We also have the anomalous situation that favors children of one illegal family over another. If a mother and father come across the borders illegally with a young child, that child does not have citizenship. But if a similar young mother and father come across the border illegally and a month later, a day later, a year later have a child, that child is a citizen. There is no legitimate reason for that distinction between those two families, those two children.

Granting birthright citizenship in these cases can also end up, as Mr. Gallegly pointed out and the chairman too, rewarding parents economically for being here illegally. Although illegal aliens are not eligible for welfare benefits, their U.S.-born children may of course

qualify for aid to families with dependent children [AFDC], and for other benefits granted to citizens. Again, Mr. Gallegly and the chairman used this data. But speaking only of California, the California Department of Social Services estimated that in the last fiscal year, almost 200,000 children of illegal immigrants received welfare, in a cost in excess of half a billion dollars.

I'd also point out, and I think this is quite relevant to what we are doing here this year, Mr. Chairman, that under welfare reform provisions that were included in the budget reconciliation bill, severe restrictions, as you all recall, on eligibility for most Government benefits would be placed on some legal immigrants. If those restrictions are in fact enacted, and they may well be, we would be in the ironic, illogical and unfair position of denying benefits for immigrants who are here legally, while granting them for children of people who are here illegally.

While as I said earlier, it goes against our nature to withdraw rights for any group of people, I would point out that in areas where people feel the impact of illegal immigration, where people live with the problem day in and day out, there is a great deal of support for changing the provision of birthright citizenship. I recently surveyed my own constituents on a number of topics. This will take just one half more additional minute, and I think it's perhaps of use, Mr. Chairman. One of the questions I asked was, "Do you support eliminating the automatic granting of citizenship to U.S. born children of illegal immigrants?" The response was overwhelmingly favorable. Eighty-three percent of the respondents supported this proposal. Only 17 percent were opposed. This is not a particularly conservative group. Seventy-nine percent of these same respondents supported the ban on assault weapons. Seventy-eight percent opposed additional restrictions on abortion. Sixty-four percent opposed allowing organized prayer in public schools. So this was a moderate to liberal group, with some conservative folks involved here. Eighty-three percent support this constitutional amendment.

I strongly believe, Mr. Chairman, if more Americans had the same exposure to the high rate of illegal immigration as those of us in California and other States with high rates of illegal immigration have, there would be overwhelming support for such a constitutional amendment. I thank you again for allowing me to testify.

[The prepared statement of Mr. Beilenson follows:]

PREPARED STATEMENT OF HON. ANTHONY C. BEILENSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I appreciate the opportunity to testify before your subcommittee in support of denying automatic birthright citizenship to U.S.-born children of illegal immigrants. Because it appears to be necessary to amend the Fourteenth Amendment of the Constitution to achieve that goal, I have introduced a proposed Constitutional amendment. H.J. Res. 56, for that purpose. This proposal, which I hope this subcommittee will consider, would provide that automatic U.S. citizenship for persons born in this country will be granted only to the children of citizens and persons with a legal resident mother or father.

The issue of birthright citizenship is one of the most difficult and emotional issues in the debate over controlling illegal immigration. We are a nation that has taken great pride in expanding the civil rights of groups of people through the years, and the notion of denying an existing right to any class of people—no matter how sensible it may be—is something that goes against our nature as Americans. Further-

more, many of us have such deep respect for the Constitution that we are reluctant to support amending it, except for the most compelling of reasons.

However, the situation we are addressing—the automatic conferring of citizenship on children of people who have entered our country in violation of our law—is so unfair that it does provide one of those rare compelling reasons for amending the Constitution.

As you know, the Fourteenth Amendment, which confers citizenship on all persons born in the United States, was adopted shortly after the Civil War in order to ensure the benefits and privileges of citizenship for African-Americans, which they had been denied by the Supreme Court's disastrous *Dred Scott* decision. Because the U.S. did not limit immigration in 1868 when the Fourteenth Amendment was approved, and therefore there were no illegal immigrants, the issue of citizenship for children of illegal immigrants was nonexistent. Thus, the granting of automatic citizenship to these children is a totally inadvertent and unforeseen result of the amendment.

This grant of citizenship to U.S.-born offspring is one of several factors that make illegal immigration attractive. The primary draw, of course, is the availability of jobs, but there is evidence that at least some illegal immigration is for the purpose of gaining citizenship. For example, one survey conducted under the auspices of the University of California found that of new Hispanic mothers in California's border hospitals, 15 percent had crossed the border specifically to give birth, and one quarter of those mothers said that their motive was to ensure U.S. citizenship for their children. And, the fact that an estimated two-thirds of births in public hospitals in Los Angeles County are to illegal immigrant mothers is an indication that, for whatever reason, a great number of children are becoming U.S. citizens by virtue of being born to parents who are in the U.S. in violation of our laws.

Whether the granting of citizenship to offspring serves as a strong incentive to illegal immigration or not, the fact is it serves as a reward for entering this country in violation of our laws. And that is fundamentally unfair. While millions of people around the world wait patiently—sometimes for many years—to immigrate legally to the U.S., those individuals who manage to circumvent our immigration laws are rewarded by having their children granted the greatest gift that we as a nation confer on individuals.

Granting birthright citizenship in these cases can also end up rewarding parents economically for being here illegally. Although illegal aliens are not eligible for welfare benefits, their U.S.-born children may qualify for Aid to Families with Dependent Children (AFDC) and other benefits granted to citizens. Based on data collected in California for AFDC's "children-only" cases, the California Department of Social Services estimated that in fiscal 1994–1995, 193,800 children of illegal immigrants received welfare, at a total cost of $553 million.

In addition, illegal immigrant parents are further rewarded by the protection against deportation they may gain by giving birth to a child here. The Immigration and Naturalization Service, from what I understand, is reluctant to deport families if it will cause undue hardship for the U.S. citizen-child; no doubt "undue hardship" could be claimed in many such cases.

I would also point out that, under welfare reform provisions that were included in the budget reconciliation bill, severe restrictions on eligibility for most government benefits would be placed on legal immigrants. If those restrictions are enacted, we would be in the ironic, illogical, and unfair position of denying benefits for immigrants who are here legally, while granting them for children of people who are here illegally.

While, as I said earlier, it goes against our nature to withdraw rights for any group of people, I would point out that in areas where people feel the impact of illegal immigration—where people live with the problem day in and day out—there is a great deal of support for changing the provision of birthright citizenship.

I recently surveyed my constituents on a number of topics, and one of the questions I asked was: "Do you support eliminating the automatic granting of citizenship to U.S. born children of illegal immigrants?" The response was overwhelmingly favorable: 83 percent of the respondents supported this proposal, while only 17 percent were opposed. And this is not a particularly conservative group: 79 of those same respondents supported the ban on assault weapons; 78 percent opposed additional restrictions on abortion, and 64 percent opposed allowing organized prayer in public schools.

I strongly believe that, if more Americans had the same exposure to the high rate of illegal immigration that our constituents in California and other states with high rates of illegal immigration have, there would be tremendous support for a Constitutional amendment to deny such birthright citizenship for U.S.-born children of illegal immigrants.

Furthermore, denying birthright citizenship in such cases would bring our laws in line with those of most European and Asian countries, which limit citizenship to the children of citizens, and use place of birth as a basis for citizenship only in exceptional circumstances. The United Kingdom, in fact—where our own citizenship laws have their roots—used to have birthright citizenship, but since 1981, because of immigration pressures, has required that one parent be a legal resident.

Finally, I would like to comment on the issue of whether we can change the birthright provision statutorily, which of course would be much easier to do. When I reviewed this issue closely a few years ago, I became convinced that a statute attempting to interpret or limit the Fourteenth amendment would not pass Constitutional muster.

The sentence in the Fourteenth Amendment relevant to citizenship states: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The statutory approach to limiting automatic birthright citizenship calls for defining persons born to illegal or nonimmigrant alien mothers as not being born "subject to the jurisdiction" of the United States, but rather as being born subject to the foreign country of which the mother is a national or citizen.

In order for the Supreme Court to accept a statutory definition of "subject to the jurisdiction" of the United States, it would have to construe two previous decisions on the Fourteenth Amendment—*United States* v. *Wong Kim Ark* and *Plyler* v. *Doe*—so narrowly as to make them practically meaningless with respect to citizenship. In essence, the Court would have to reverse a century of understanding of what the Fourteenth Amendment means. That seems so unlikely that, rather than pass a statute that appears certain to be ruled unconstitutional, I believe it makes more sense for Congress to proceed with a Constitutional amendment.

Illegal immigration is one of the fastest growing and most pressing problems facing our nation. The Constitutional amendment proposed by my legislation and others is a reasonable response to this issue that would restore a sense of fairness in our nation's granting of citizenship. I urge this subcommittee to move forward with such an amendment.

Mr. SMITH. Thank you, Mr. Beilenson. Congresswoman Zoe Lofgren.

STATEMENT OF HON. ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. LOFGREN. Thank you, Mr. Chairman. Thank you for allowing me to testify today. I am here certainly as a Member of Congress, but also as a Californian who very much opposes and is deeply troubled by the bills before us.

For hundreds of years, our Nation has subscribed to the common law precept of jus soli, which recognizes that citizenship is based on the place where a person is born. This rule was accepted as the law for our new democracy, and ultimately codified in the 14th amendment and Civil Rights Act of 1866. These congressional actions were in response to an anomalous and of course infamous Supreme Court decision, *Dred Scott*, which denied citizenship rights to freed slaves. In 1866, during Senate debate on the 14th amendment, one legislator, Senator Conness, said, "I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States."

I think it is disturbing that we are actually contemplating a contravention of constitutional and civil rights as expressed by the 39th Congress. I think that as elected representatives, we should be if anything, more enlightened than American society and the Congress of 130 years ago.

Following its passage, the 14th Amendment was interpreted by the Supreme Court as an affirmation of the traditional jus soli rule,

and in *Wong Kim Ark* v. *the United States*, the court held that the "14th amendment . . . has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a sufficient and complete right to citizenship." It would be very difficult for the Court to be more clear on this point, and I think it casts much doubt on the constitutionality of any of the bills purporting to alter the right to citizenship at birth.

Franklin Delano Roosevelt once said, "We are a Nation of many nationalities, many races, many religions, bound together by a single unity, the unity of freedom and equality." A bedrock principle of this equality is that all people enjoy the same rights and privileges based on their individual existence. You can not be condemned in America by the Government for your cultural or religious background or for anything your parents might have done. The proposals before us would do just this.

This country was founded as a nation of immigrants. Immigrants and their children have contributed to our success as an economic and political superpower. Captains of industry, like Lee Iococca, former Joints Chief of Staff, Gen. Colin Powell, all came to America from elsewhere or their parents did. We draw strength from our diversity and we learn from our differences.

While immigration to America entails both benefits and challenges, which I am well aware of as a Californian, the melting pot that is America remains a symbol of tolerance and a model of assimilation across the globe. I find it ironic indeed that many of the people, not necessarily members of this committee, who espouse the need for these bills, urge us to unite under one language, and seek one religion to rule our Nation, yet would divide us according to the circumstances of our birth.

I think this legislation is offensive in other ways because it disadvantages the most vulnerable members of our society, infants, who through no fault or actions of their own, are born to parents of undocumented status. How are these babies different in a constitutional or legal sense from the offspring of American citizens? The obvious answer is that they are not. As the Supreme Court held in *Plyler* v. *Doe*, undocumented children are "innocent" and "can neither affect their parents conduct nor their own status."

The damage to the Constitution and to our democracy that these proposals would render by itself is reason enough to reject them. While many in our country have concerns, and I do as well, about unlawful immigration, we should measure carefully our remedies, to ensure that whatever remedy we devise for the issue of illegal immigration, does not in the long run create more problems for our country than it solves. I think these proposals fail on that measure as well.

As many of you know, I taught at law school, an immigration course for several years at the University of Santa Clara. I also practiced immigration law, and I thought about these measures from a practical point of view as well. As I'm sure you are aware, there are many countries in the world that do not recognize as citizens children of citizens who are born abroad. In fact, derivative citizenship is not always available to the offspring of American citizens who give birth abroad. It needs to be vested, with limited time frames involved. That is equally true around the country.

I have thought, how would this work if you have the offspring of an undocumented immigrant here, who has no rights to be a citizen of any other country? And as you think forward, what generational divisions would result if that child should have a child? You would face the potential of creating really a separate and distinct class in society that is unknown to America, and I think damaging to the fabric of our society.

I would note also that nations where similar measures have been in place, for example Germany and others, that have created permanent and perpetual underclasses of noncitizens, stateless persons, have faced enormous political division and turmoil as a consequence. So we should proceed very cautiously in this matter.

I will submit the remainder of my statement for the record. Thank you, Mr. Chairman.

[The prepared statement of Ms. Lofgren follows:]

PREAPRED STATEMENT OF HON. ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I would like to thank my Colleagues on the Judiciary Committee, Chairman Smith and Chairman Canady, for the opportunity to give testimony on this important issue.

I asked to be here today because I am very concerned about these proposals, which I consider to be attacks on the Constitution.

For hundreds of years, our nation has subscribed to the common law precept on *jus soli*, which recognizes that citizenship is based on the place where a person is born. This rule was accepted as the law for our new democracy and ultimately codified in the Fourteenth Amendment and the Civil Rights Act of 1866. These congressional actions were in response to an anomalous and infamous Supreme Court decision, *Dred Scott*, which denied citizenship rights to freed slaves.

In 1866, during Senate debate on the Fourteenth Amendment, one legislator, Senator Conness, proclaimed, "I vote for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States."

I must say that I find it disturbing that we are actually contemplating a contravention of Constitutional and civil rights as expressed by the *39th Congress*. I would hope that we as a country, and as elected representatives, are, if anything, more enlightened than the American society and Congress of 130 years ago.

Following its passage, the Fourteenth Amendment was interpreted by the Supreme Court as an affirmation of the traditional *jus soli* rule and in *Wong Kim Ark* v. *the United States* the Court held that the "Fourteenth Amendment . . . has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." It would be very difficult for the Court to be more clear purporting to alter the right to citizenship at birth.

President Franklin Delano Roosevelt once said, "We are a nation of many nationalities, many races, many religions—bound together by a single unity, the unity of freedom and equality." A bedrock principle of this equality is that all people enjoy the same rights and privileges based on their individual existence. You cannot be condemned by the government for your cultural or religious background or for anything your patents might have done. The proposals before us would do just this.

This country was founded as a nation of immigrants, and immigrants and their children have contributed much to our success as an economic and political superpower. Captains of industry, like Lee Iacocca, were born to immigrants. The parents of the former Chairman of the Joint Chiefs of Staff, General Colin Powell came to American from Jamaica. We draw strength from our diversity, and learn from our differences.

While immigration to America entails both benefits and challenges, the melting pot that is America remains a symbol of tolerance and a model of assimilation across the globe. I find it extraordinarily ironic that many of the same people that espouse the need for us to unite under one language and one religion would seek to divide us according to the circumstances of our birth.

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This legislation is also offensive because it would disadvantage some of the most
lnerable members of our society—infants, who through no fault or actions of their
vu n, are born to parents of undocumented immigrant parents. How are these babies
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h der by itself is reason enough to reject them. While many in our country have
re ncerns about unlawful immigration, we should measure carefully any remedies to
co sure that any remedy does not have more long term problems than the issue we
en attempting to address.
ar However, I also believe that it is interesting to look at the practical effects that
l uld result from the enactment of this legislation.
wo One result would be that many American-born, would-be citizens, would instead
c rendered "stateless," citizens of no country. Many countries do not automatically
be ribe citizenship based on parental citizenship. For instance, the child of an Amer-
as n born overseas can obtain derivative citizenship through its parents, but only
ic t returns to claim it within a set period of time.
if Therefore, a child born here to foreign parents could very conceivably be without
T country, as would all of his or her descendants if he or she did not marry a citizen.
a c ese people would have nowhere else to go, and would be forced to remain here,
Th ping to avoid detection by the government. With policies such as these we could
ho creating perpetual generations of stateless, undocumented aliens. I do not see
be w this constructively addresses the illegal immigration problem.
ho Another likely outcome would be chaos in maternity wards and incredible admin-
A rative burdens for the doctors, nurses, and hospital administrators that provide
ist tetric care to women having babies. They would have to assist the government
ob establishing the immigration status of all mothers who are giving birth or have
in t given birth. Most women don't think to bring proof of immigration status to the
ju very room. The costs and increased bureaucracy that such a system would create
de obvious.
ar Furthermore, one can see the likelihood of suspicion and discrimination based on
F nicity, which have no place in places of birth or healing. Any woman, regardless
et immigration status, should not be deterred from receiving the prenatal and
of natal care that she needs. Such policies could actually increase the cost of illegal
ne migration to our health care system, because, as studies have shown, we can
im id the expense of numerous premature births with much less expensive prevent-
av e prenatal care.
at It also is questionable that this change in policy would have any demonstrable
t act on illegal immigration. The problem of illegal immigration is serious and we
im d to take reasonable steps to prevent and deter it. I have supported the in-
ne ased border patrols called for in Chairman Smith's immigration bill, H.R. 2202,
cr improved worksite enforcement mechanisms that have been implemented by
an Immigration and Naturalization Service. However, I seriously doubt that denial
th irthright citizenship would influence most aliens, because most undocumental
of b migrants come to this country because of economic opportunity and to escape op-
im ssion, not to determine the citizenship status of their offspring.
pr Federal appellate courts have upheld the refusal of the INS to stay the deporta-
tio of undocumented aliens solely on the basis that they have U.S.-citizen, minor
chil dren, because this would grant an unfair advantage to these aliens over other
alie ns who obeyed our immigration laws. There is no legal benefit for undocumented
pare nts to give birth to American children. I understand that in some border areas,
it is argued that mothers sometimes make efforts to give birth in this country in
ord r to provide an opportunity for their children. To the extent that this is a real
iss e, it can be addressed in a much more measured fashion than the bills before
the committee—primarily through enhanced border enforcement.
So me of my colleagues have also alleged that some aliens want to have an Amer-
ican-born child for the purpose of eventually legally immigrating as an immediate
fami ly member once the child reaches the age of majority. I taught immigration law
at S anta Clara State University and was an immigration attorney for a number of
year s, but in all my experience, I have never encountered the situation in which a
moth er planned a birth so that 21 years later her offspring could file a petition that
woul d be approved and numerous years later result in residence for the parent. I
serio usly doubt that such a tactic could ever be widespread or should be the basis
for s uch a fundamental change in our Constitution.
Me embers of the Subcommittees, as a Representative from California, I am fully
awar e of the burdens that illegal immigration can impose on local governments, the

States, and the Federal government. However, these proposals are extreme, unconstitutional, and contrary to the traditions of our republic. I believe they would also have almost no effect of the illegal immigration problem. I hope that we will abandon these efforts and look for real solutions to the problems that confront us.

Thank you for the opportunity to address you this morning.

Mr. SMITH. Thank you, Ms. Lofgren.

Congressman Mark Foley.

STATEMENT OF HON. MARK FOLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. FOLEY. Thank you very much, Mr. Chairman. I appreciate your leadership on this issue, as well as Chairman Canady.

As Congress presses forward on the comprehensive immigration reform, I believe it is of critical importance that we address one of the major incentives encouraging illegal immigration to the United States, the promise of birthright citizenship to anyone born on the U.S. soil.

Before I begin my own testimony, I would like to share with you a personal story about my own heritage. Like most Americans, I am the proud descendent of immigrants. My grandmother was an immigrant from Poland. She came to the United States through the legal immigration process with a sponsor, a clean bill of health, and a desire to find a job. My grandmother worked for years as a maid in a local motel, supporting her family without any assistance from our welfare system. She was proud to become an American citizen as were thousands of immigrants who shared her hopes and dreams.

Historically, the United States has been a country of immigrants like my grandmother, who possessed a passionate respect for the freedoms and liberties so many of us take for granted. America has truly been the gateway to new opportunities, symbolizing individualism, independence, and entrepreneurship. However, this perception has been tarnished over the years by incentives promoting dependency and big Government as a way of life. Today we see Government dependency undermining the very ideals our ancestors so warmly embraced. The spiraling cost of immigration, particularly illegal aliens, who have crossed our borders, has galvanized the debate over the urgent need for immigration reform.

Americans believe the Federal Government has failed to secure our borders. They question why their tax dollars are being spent on illegal immigrants, when we can not afford to take care of our own citizens first. Estimates by experts indicate undocumented aliens residing in the United States is somewhere between $3 and $4 million. This number has been growing by at least 300,000 a year. The State of Florida, my home State, estimates that in 1993, State and local governments spent $2.5 billion in public assistance and services for immigrants. Over a third of those tax dollars were used specifically to cover the costs incurred by illegal aliens.

One of the factors attracting illegal immigrants to the United States is the automatic citizenship to any child born on American soil. Under current citizenship requirements, children born to undocumented aliens become automatic citizens and are eligible for Federal benefits, all paid for with our tax dollars. According to the San Diego Union-Tribune article, an estimated 96,000 babies were born to undocumented women who were covered under California's

Medi-Cal, State Medicaid program in 1992 alone. The cost to California taxpayers, more than $230 million in medical bills that year.

Some may suggest illegal immigration is only a problem for border States. While it is true that States like Florida, California, and Texas generally have the highest number of illegal immigrants, citizens of every State pay taxes to support Federal programs which benefit those who have broken our laws and illegally entered the United States. Illegal aliens receive Government benefits on behalf of their children, such as aid to families with dependent children [AFDC], food stamps, school nutritional programs, and health services. The General Accounting Office estimates it cost taxpayers $479 billion in 1992 for providing AFDC benefits alone to citizen children of illegal immigrants.

Therefore, I have introduced the Citizen Clarification Amendment of 1995, which would modify our citizenship requirements. This bill would amend our Constitution, allowing a person born in the United States to be granted citizenship only if at least one parent is a lawful citizen, a lawful resident of the United States, or has lawful status under the immigration laws of the United States at the time of birth. In fact, most other countries have already limited their citizenship requirements, including England, France, Australia, Germany, and Italy, just to name a few.

The 14th amendment reads, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States." The fundamental purpose of this amendment was to confer Federal citizenship on the newly freed slaves following the Civil War so that they would be granted citizenship and afforded the same civil rights as all Americans. During the original debate over this amendment, Senator Howard Jacob stated, "This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."

Clearly it was not the intent of Congress, the Framers of the 14th amendment to include illegal aliens within the parameters of the citizenship clause. However the clause has been broadly interpreted to grant citizenship to anyone born on U.S. soil, even if the parents have broken our laws and illegally entered this country.

While the Supreme Court has never considered the specific question of the children of illegal immigrants, it has considered cases on the broad issue of citizenship and the 14th amendment. One of the cases most commonly cited in discussion on immigration is the *United States* v. *Wong Kim Ark* in 1989. At issue in this case was a man who was born in California to Chinese parents, who at the time were not allowed to become naturalized citizens based on racial grounds.

Mr. SMITH. Excuse me, Mark. Continue. That was just a 5-minute warning. So if you can summarize it, that would be good.

Mr. FOLEY. Very quickly, the Supreme Court held the man was indeed a citizen since he was born in and subject to the jurisdiction in the United States. In the majority view of the court, the United States had accepted the English common law standard for citizenship at birth when it chose to adopt the 14th Amendment. The Court's opinion suggests that by adopting the concept into our Con-

stitution, the meaning of citizenship was protected by the authority of the Constitution and could not be revised by an act of Congress. It is interesting to note England ended its custom of granting birthright citizenship in 1983 after seven centuries of legal tradition.

The bottom line, folks, we think this is an important aspect to look at. We believe it needs to be amended in the Constitution. We believe we should go forward with the debate. I believe Congress should urgently consider this amendment and clarifying amendment to the Constitution and then move forward, giving the States the right to also make that determination.

[The prepared statement of Mr. Foley follows:]

PREPARED STATEMENT OF HON. MARK FOLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

I commend the leadership of Chairman Canady and Chairman Smith for holding this joint hearing on the issue of birthright citizenship. As Congress presses forward on comprehensive immigration reform, I believe it is of critical importance that we address one of the major incentives encouraging illegal immigration to the United States: the promise of birthright citizenship to anyone born on U.S. soil.

Before I begin my testimony, let me share with you a personal story about my own heritage. Like most Americans, I am the proud descendant of immigrants—my grandmother was an immigrant from Poland. She came to the U.S. through the legal immigration process with a sponsor, a clean bill of health and the desire to find a job. My grandmother worked for years as a maid in a local motel, supporting her family without any assistance from our welfare system. She was proud to become an American citizen, as were thousands of immigrants who shared her hopes and dreams.

Historically, the United States has been a country of immigrants like my grandmother who possess a passionate respect for the freedoms and liberties so many of us take for granted each day. America has truly been the gateway to new opportunities, symbolizing individualism, independence and entrepreneurship. However, this perception has been tarnished over the years by incentives promoting dependency and big government as a way of life.

Today, we see government dependency undermining the very ideals our ancestors so warmly embraced. The spiraling costs of immigration, particularly illegal aliens who have crossed our borders, has galvanized the debate over the urgent need for immigration reform. Americans believe the federal government has failed to secure our borders and they question why their tax dollars are being spent on illegal immigrants when we cannot afford to take care of our own citizens first.

Experts estimate that the number of undocumented aliens residing in the United States is somewhere between 3 and 4 million—and this number has been growing by at least 300,000 a year. The State of Florida estimated that in 1993, state and local governments spent $2.5 billion in public assistance and service programs for immigrants. Over a third of these tax dollars were used specifically to cover the costs incurred by illegal aliens.

One of the factors attracting illegal immigrants to the U.S. is automatic citizenship to any child born on American soil. Under current citizenship requirements, children born to undocumented aliens become automatic citizens and are eligible for federal benefits—all paid for with our tax dollars. According to a San Diego Union-Tribune article, an estimated 96,000 babies were born to undocumented women who were covered under California's Medi-Cal (state Medicaid program) program in 1992 alone. This cost California taxpayers more than $230 million in medical bills that year.

Some may suggest illegal immigration is only a problem for border states. While it is true that states such as Florida, California and Texas generally have the highest numbers of illegal immigrants, citizens of every state pay taxes to support federal programs which benefit those who have broken our laws and illegally entered the U.S. Illegal aliens receive government benefits on behalf of their citizen children, such as Aid to Families With Dependent Children (AFDC), Food Stamps, school nutrition programs and health services. The General Accounting Office estimated that it cost taxpayers $479 million in 1992 for providing AFDC benefits alone to the citizen children of illegal immigrants.

Therefore, I have introduced the Citizenship Clarification Amendment of 1995, which would modify our citizenship requirements. This bill would amend our Con-

stitution, allowing a person born in the U.S. to be granted citizenship only if at least one parent is a lawful citizen, a lawful resident of the United States, or has lawful status under the immigration laws of the United States at the time of birth. In fact, most other countries have already limited their citizenship requirements, including England, France, Australia, Germany and Italy just to name a few.

The Fourteenth Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . ." The fundamental purpose of this amendment was to confer Federal citizenship on the newly freed saves following the Civil War so that they would be granted citizenship and afforded the same civil rights as all Americans.

During the original debate over this Amendment, Senator Howard Jacob, stated: "This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the government of the United States, but will include every other class of persons."

Clearly, it was not the intent of Congress or the Framers of the Fourteenth Amendment to include illegal aliens within the parameters of the citizenship clause. However, the clause has been broadly interpreted to grant citizenship to anyone born on U.S. soil, even if the parents have broken our laws and illegally entered this country.

While the Supreme Court has never considered the specific question of children of illegal immigrants, it has considered cases on the broad issue of citizenship and the Fourteenth Amendment. One of the cases most commonly cited in discussions on immigration is the *United States* v. *Wong Kim Ark* in 1898. At issue in this case was a man who was born in California to Chinese parents, who at the time were not allowed to become naturalized citizens based on racial grounds.

The Supreme Court held that the man was indeed a citizen since he was born in and "subject to the jurisdiction" of the United States. In the majority view of the Court, the U.S. had accepted the English common law standard for citizenship at birth when it chose to adopt the Fourteenth Amendment. The Court's opinion suggests that by adopting this concept into our Constitution, the meaning of citizenship was protected by the authority of the Constitution and could not be revised by an act of Congress. It is interesting to note England ended its custom of granting birthright citizenship in 1983 after seven centuries of legal tradition.

Our Founding Fathers and the Framers of this Amendment could not have foreseen the current wave of illegal immigration we are experiencing today. During the national debate over immigration reform, it is only appropriate that we clarify the intent of our citizenship requirements to ensure they do not serve as a catalysis for illegal immigration. The most effective and practical process is amending the Fourteenth Amendment and avoiding the potential legal battles of statutory reforms.

There have been many proposals introduced in the 104th Congress to amend the Constitution, and I am often asked why I believe it is appropriate or necessary to modify our citizenship requirements by amending the most sacred document of our nation. We must amend the Constitution because the Fourteenth Amendment, in and of itself, is very clear: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . ." I believe The Citizenship Clarification Amendment will clarify the original intent of our citizenship clause and restore integrity to the legal immigration process.

I would like to also bring to the Committee's attention another commonly asked question about birthright citizenship, "Does this proposal unduly target children?" On the contrary, this legislation places appropriate responsibility where it is due: with the parents. Research in recent years indicates that immigrants come to America for better jobs, quality medical care and automatic citizenship to their children born in America. I sincerely believe my legislation will serve as a strong deterrent for illegal immigration.

As Congress begins to consider needed reforms to our immigration system, the time is right to address our nation's citizenship requirements. Confronting this important issue now is in the best interests not only of Americans, but also of immigrants who have come to the U.S. through our legal immigration process. Otherwise, we will have failed to restore fairness and integrity to the legal immigration system and will have preserved a major incentive to illegal immigration.

Thank you, Mr. Chairman, for allowing me the opportunity to testify on this issue today. Before I conclude, I would also like to submit some additional attachments with my testimony for the Subcommittees' review.

The power to regulate immigration is an integral aspect of national sovereignty. In losing control of its borders, the United States relinquishes a significant part of its sovereignty. Today, the United States is unable to effectively exercise one of the primary attributes of sovereignty—distinguishing citizens from non-citizens.

The Fourteenth Amendment brought the first meaning of citizen to the Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . ." Although the fundamental purpose of this clause was to secure citizenship for newly freed slaves after the Civil War, the amendment today is almost universally understood to confer citizenship upon all persons born in the United States, regardless of whether they are legally in the country or not.

The meaning of the Fourteenth Amendment, however, does not dictate the universal application. The subordinate clause of the amendment—"subject to the jurisdiction thereof" limits or qualifies the first phrase—"All persons born or naturalized." Thus, although there is no authoritative interpretation by the Supreme Court, the amendment requires individuals to be both "born or naturalized" AND "subject to the jurisdiction."

Furthermore, legislative debates reveal the limits of this clause. Senator Jacob Howard, the author of the clause, intended "foreigners," "aliens," and those born to "ambassadors of foreign ministers" to be outside the jurisdiction of the United States. In addition, Senator Lyman Trumball, chairman of the Senate Judiciary Committee and a powerful supporter of the Fourteenth Amendment, stated that the limit refers to those "not owing allegiance to anybody else."

Just government requires the unanimous consent of each and every individual who is governed. Not only must the individual consent to being governed, but he must also be accepted by the community as a whole. Granting citizenship to all persons within the geographical boundaries of the United States is conferring citizenship without the consent of "the whole people."

Which Countries Grant Birthright Citizenship?

COUNTRY	BIRTH*		NOTES
Algeria		No	Father must be Algerian or stateless
Argentina	Yes		
Australia		No	Children of immigrants born in Australia are citizens
Belgium		No	One parent must be a citizen of Belgium
Brazil	Yes		
Cameroon	Yes		
Canada	Yes		Children born to foreign parents after February 1977 are citizens at birth
Colombia		No	One parent must be a legal resident
Czech Republic		No	One parent must be a citizen of Czech Republic
Egypt		No	Father must be an Egyptian citizen
France		No	A child of foreign-born parents must apply and be approved for citizenship
Germany		No	Those born in Germany automatically acquire the citizenship status of their mother
India	Yes		
Israel		No	If Jewish, a child is automatically a citizen; otherwise, must be the child of an Israeli National to be a citizen
Italy		No	One parent must be Italian
Jamaica	Yes		
Japan		No	One parent must be a citizen of Japan
Kenya		No	One parent must be a citizen of Kenya
Kuwait		No	Father must be a citizen of Kuwait
Mexico	Yes		
New Zealand	Yes		
Nigeria		No	One parent must be a Nigerian citizen
Norway		No	One parent must be Norwegian
Pakistan	Yes		
Philippines		No	One parent must be a citizen of the Philippines

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COUNTRY	BIRTH*		NOTES
Poland		No	One parent must be Polish
Republic of Korea		No	One parent must be a citizen of Korea
Saudi Arabia		No	Father must be a citizen (child is added on the fathers passport)
Spain	Yes		However, the child needs one year of residence to become a citizen if the parents are foreigners
Sweden		No	If mother is Swedish, the child acquires citizenship at birth; if parents are resident aliens, the children acquire the citizenship of their parents
Switzerland		No	If child was born before June 1, 1985, the father must be Swiss for the child to be a Swiss citizen; if the child is born after June 1, 1985, the child will be a Swiss citizen if either parent is Swiss
Syria		No	One parent must be a citizen of Syria
Taiwan		No	One parent must be a citizen of Taiwan
Turkey		No	One parent must be a citizen of Turkey
United Kingdom		No	One parent must be a citizen or a legal resident of the UK for the child to be a citizen
United States	Yes		
Venezuela	Yes		
Zaire		No	Mother must be a citizen of Zaire

*"Birth" refers only to whether or not a person is guaranteed citizenship simply by being born in that country. However, excluded from consideration are the children of diplomats, or other persons on official government business in a foreign country.

SOURCES:

Aspectos Juridicos e Institucionales de las Migraciones - Colombia - 1991. International Organization for Migrations, Geneva, 1991.

Bin-Nun, Ariel. *The Law of the State of Israel: An Introduction*. Jerusalem, Israel: Rubin Mass, 1990.

Individual Country Embassies.

Israel Law of Return, 5710 - 1950, 4 L.S.I. 114.

Jenks, Rosemary, ed. *Immigration and Nationality Policies of Leading Migration Nations*. Washington, DC: Center for Immigration Studies, 1992.

Simpson, Senator Alan. "Immigration: The Problem, Guiding Principles, and Reform Proposals." *Congressional Record*. Vol. 139, No. 114, Aug. 6, 1993.

Sarah A. Adams is an intern at the Center for Immigration Studies.

Mr. SMITH. Thank you, Mr. Foley. I would like to encourage members to stay here and hear Professor Jordan's testimony. Then we will have plenty of time to get to this vote. We will recess for the vote and then reconvene right afterwards.

Professor Jordan.

STATEMENT OF HON. BARBARA JORDAN, PROFESSOR, JOHNSON SCHOOL OF PUBLIC AFFAIRS, UNIVERSITY OF TEXAS AT AUSTIN, AND CHAIR, U.S. COMMISSION ON IMMIGRATION REFORM

Ms. JORDAN. Thank you, Mr. Chairman. Thank you for the chance to come and testify on the issue that is before you today, because it is an important one. The Commission on Immigration Reform which I chair has not made any recommendation on the bills before you. We have not taken a position about the 14th amendment and its application to immigration. I would like to ask that my written testimony be entered into the record, and just give you my personal views first. I'll do that briefly now.

There are profound problems as I see it in the constitutional amendments. Making the immigration status of the mother the key to an American-born child's citizenship, for example, that's one of the amendments, would require the Federal Government to disown its obligations to citizen children. Consider the case of a citizen father married to a foreign mother. If the child is born abroad, the child is automatically made a U.S. citizen upon petition. If the child is born while the mother is in the United States, perhaps she is overstaying a visa from Thanksgiving to Christmas, the father's citizenship would not confer citizenship on the child. The father's natural right to pass his citizenship to the child would be denied. He would have to ask the Federal Government to bless that child with citizenship.

It is not the practical problems which are really so profound here, but the principle. There are three ways to become a citizen, as you know: by choice, naturalization; blood, have American parents; and birth in this country. There are some countries like Germany, they have a very simple method. With very few exceptions, you can only be German if your ancestors were German. There are hundreds of thousands of second and third generations of people born in Germany who will never be German. Congress should think again whether we want this country to be like Germany.

De Tocqueville, who said a lot of important things, made this statement, "The government of a democracy brings the notion of political rights to the level of the humblest citizens." Citizens, citizens. That's a very beautiful word. It's an American word. With all due respect to the Republicans here, the true conservative revolution happened in 1776, not in 1994. The Founders, you will recall, had great protest against the English Parliament. They wanted to assert their rights as Englishmen. The King and the crown denied it. They fought a war, a revolution. As a consequence of that revolution, we got this statement: All men are created equal, endowed by their Creator with certain unalienable rights. The Government doesn't give rights. We are born with them.

I would be the last person to say we're a perfect nation. But we have a kind of perfection in us, Mr. Chairman, because of the uni-

versality that we have as a people. When the Declaration was written and the Bill of Rights was added to it, they should have said everybody was included in America, black, white, whatever your ethnicity, whatever your race, whatever your background. They didn't include women and they didn't include black people. But I'm in there now because the 14th amendment put me there. These are self-evident principles.

To deny birthright citizenship is to derail the engine of American liberty. Progress in America is not an accident. Immigration drove us down this track where we have such diversity yet such unity. The 14th amendment says all persons born or naturalized in the United States, subject to the jurisdiction here, are citizens of the United States. Beautiful. That originally was in a statute, the 1866 civil rights law. But they knew that you must put things like that in the Constitution. You cannot put it in a statute. If you put things in the Constitution, they can't be changed easily. That is what is before you now.

Let me say that in my other hat, as Chair of the Commission on Immigration Reform, you have done a good job, Mr. Chairman, of putting some of our recommendations in legislation and having them considered by the body of the House of Representatives and also the Senate, and hopefully to become law. You could get distracted by something as difficult as putting a triviality into the Constitution of the United States. Don't do that. You've got too many more important reforms that you can make to immigration that would get us a long road down the road to reform.

There is no one who knows better than you and the members of your committee how difficult it has been to get some of the things in your bill that you got in there. For instance, worksite verification. I understand there will probably be an amendment on the floor to take that out. Don't let it happen. You know that you didn't get there easily. It took long, arduous concentrated effort. Do not be distracted from the real problems and real solutions by something as divisive as trying to rework the Constitution of the United States and the 14th amendment.

People come to this country illegally because they want jobs. That is why they come. They do not come to have babies. We have had 3 years of consultations, testimony, all telling us what needs to be done on the issue of immigration. But none of them said that illegal immigration is a problem caused because people come across our border to have children. You saw a member of our Commission, Richard Estrada, last week. He said his view: don't let the United States follow the Kuwait model, where citizens are the privileged elite and the foreigners do the dirty work. That is not America.

The Commission has outlined an informed comprehensive measured strategy to deter illegal immigration. That is the way to approach the problem.

Mr. Chairman, I thank you for this opportunity. I ask that you give an American response, not an emotional divisive response to this problem of birthright citizenship. Thank you very much.

[The prepared statement of Ms. Jordan follows:]

PREPARED STATEMENT OF HON. BARBARA JORDAN, PROFESSOR, JOHNSON SCHOOL OF PUBLIC AFFAIRS, UNIVERSITY OF TEXAS AT AUSTIN, AND CHAIR, U.S. COMMISSION ON IMMIGRATION REFORM

Good morning, I am Barbara Jordan, and I am pleased to have this opportunity to testify on such an important matter. I am here in a dual capacity. I was once a member of the House Judiciary Committee, and I have studied the Constitution. Presently, I teach political values and ethics at the LBJ School of the University of Texas. I hope I can bring some education and experience to bear before you today.

I am also Chair of the bipartisan Commission on Immigration Reform. As you know, our Commission has been deeply engaged in debate regarding our national interest in sound immigration policy—in solving problems, completing unfinished business, and avoiding future error. We have made two reports to date, making recommendations for specific reforms to Congress. Our first report recommended a comprehensive strategy for deterring illegal immigration. It is called U.S. Immigration Policy: Restoring Credibility, and I will have more to say about it in a moment.

Our second report is called Legal Immigration: Setting Priorities, which we presented to Congress this spring. We on this Commission have been gratified that our work has helped this Subcommittee in preparing legislation to advance the national interest in immigration policy. We are a Congressional commission, and it is our job to serve you.

But this Commission has not made recommendations on the matter before you today. As a bipartisan Congressional panel, we have not addressed the 14th Amendment's application to immigration. But, personally I would like to do so now—briefly.

There are profound problems, as I see it, in the Constitutional amendments before this Subcommittee. By making the immigration status of the mother the key to an American-born child's citizenship, for example, one of these amendments would require that the Federal government disown its obligations to citizen children. Consider the case of a citizen father married to a foreign mother. If the child is born abroad, the child is automatically made a U.S. citizen upon petition. If the child is born while the mother is in the United States, perhaps by overstaying a tourist visa from Thanksgiving to Christmas, neither the father's citizenship nor the birth on U.S. soil of an American child provides that child American citizenship. In fact, the father's natural right to pass on his citizenship to the child is denied. He must ask the government to bless his child.

But it is not the practical problems, profound as they are, on which I wish to focus. It is the principle.

There are three ways to become an American—by choice, through naturalization; by blood, through having an American parent; and by birth in the United States. It is also true that most nations do not have these three methods. The simplest contrast is Germany. With very few exceptions, you can only be a German if your ancestors were German. There are hundreds of thousands of second and third generations of people, born in Germany, knowing no other nation, who are not German, who will never be German. Congress should think again whether you wish to make the United States more like Germany.

De Tocqueville wrote of America that "The government of a democracy brings the notion of political rights to the level of the humblest citizens." And that is what we are talking about: citizenship. It is a beautiful word. It is an American word. The modern concept of citizenship is largely an American invention. It has Greek and Roman roots, to be sure. But we grew in the soil of the United States the modern concept of citizenship that so much of the world has adopted at last.

With all due respect to my Republican colleagues, the true "conservative revolution" happened in 1776. The Founders, you will recall, originally fought only to claim as colonists their rights as Englishmen. It is when King and Parliament denied those rights that they took the revolutionary step of asserting that these rights were not granted to them, as subjects, from the Crown, but that "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights." This idea—the American idea—is that governments do not grant rights. We are born with them.

I would be the last person to claim that our nation is perfect. But we have a kind of perfection in us because our founding principle is universal: that we are all created equal regardless of race, religion, or national ancestry. When the Declaration of Independence was written, when the Constitution was adopted, when the Bill of Rights was added to it, they all applied almost exclusively to white men of Anglo-Saxon descent who owned property on the East Coast. They did not apply to me. I am female. I am black. But these self evident principles apply to me now as they apply to everyone in this room.

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To deny birthright citizenship would derail this engine of American liberty. Progress in America is not an accident. It was immigration that drove us down the track toward a broader and more truthful vision of ourselves. It was immigration that taught us that, in this country, it does not matter where you came from, or who your parents were. What counts is who you are. The 14th Amendment of the Constitution says, in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside."

This was originally a statute, the Civil Rights Act of 1866. Its authors knew that, as a statute, it was vulnerable to being overturned by future lawmakers. That, they determined, must not happen. We must not forget the history of the 14th Amendment, or the context in which it was passed. We had fought a bloody civil war. And now, three amendments to the Constitution were adopted—to end slavery; to provide equal protection of the laws; and to guarantee the right to vote.

I do not believe it is possible to amend the Constitution, or alter the meaning of the words, by statute. In this case, any attempt would have significant negative consequences. For example, H.R. 1363 would specify that certain children of illegal aliens are "not subject to the jurisdiction of the United States." Do we really want to give these individuals immunity from Federal prosecution for criminal acts? I am not sure how we could prosecute someone not subject to our jurisdiction.

So if the Congress wishes to deny citizenship to children of illegal aliens, it must follow the intentionally arduous path of a Constitutional amendment. I hope that you will not take this step.

A constitutional amendment requires a supermajority vote in both the House and the Senate, and the ratification of two-thirds of the state legislatures, presently 38 states. Even if—which I oppose—it was sound policy to so amend the Constitution, it will take time. It will take resources. It will divide the country on the most profound level—the question of who we are as a people, and who says so.

Let me go beyond my personal views here, to speak as the Chair of the U.S. Commission on Immigration Reform. Do not let debate on birthright citizenship distract you from the urgent business of controlling illegal immigration, which is essential to the credibility of our commitment to the national interest in legal immigration.

Ably led by your Subcommittee Chair Lamar Smith, and the ranking minority member, John Bryant, you have an opportunity in this Congress to take significant steps to deter illegal immigration and promote lawful immigration in the national interest. You have labored in this Subcommittee to produce a bill, H.R. 2202, which takes some of the prudent, measured steps recommended by this bipartisan Commission, to do what needs to be done. The comprehensive strategy this commission recommended last year to deter illegal immigration has seven parts: (1) Better border management; (2) development of a better system for worksite verification; (3) benefits eligibility consistent with the goals of immigration policy; (4) deportation of illegal aliens; (5) emergency management; (6) reliable data; and (7) attacking the root causes of unlawful migration in the sending countries.

There is no one who knows better than those who serve on this Commission, how hard it has been to advocate these tough choices. But we believe that they are necessary, and through your actions as legislators, valuable progress in all of these areas is within reach.

Please do not be distracted from these real measures to attack illegal immigration through the Constitutional amendment process. There are far better ways to deal with illegal immigration than to cut the Constitutional baby with a sword, and say, this half is a citizen, and that half is not.

There will be those who will try to deny reality, when the whole House faces this issue shortly. But the vast majority of illegal aliens do not come to America to bear children, although it does happen. In three years and dozens of hearings, consultations and expert discussions, no one has ever reported to the Commission that the vast majority of births to illegal aliens are anything more than a reflection of the large numbers of illegal aliens who are here. The reason most illegal aliens come to our country boils down to three words: They get jobs.

There will be a vote on the House floor on retaining the provision to test worksite verification that the Judiciary Committee approved in H.R. 2202. There will be those who claim that it is not worth testing the system you have endorsed. There are also those who whisper in these hallways that illegal immigration isn't so bad, so long as they will work hard for low pay, so long as they do the dirty jobs that Americans supposedly won't do, so long as their children aren't to become Americans.

Caution. There are nations in the world that have tried this, and we are not like them. We are not a nation that is permanently divided into "us", and "them". You heard last week from my colleague on the Commission, Richard Estrada, who gave

as his views that the United States must not follow the Kuwait model, where citizens are the privileged elite, and foreigners do the dirty work. I agree.

The Commission on Immigration Reform has outlined a comprehensive strategy to deter illegal immigration—including the development and testing for a reliable system for worksite verification that protects our civil liberties.

I believe that treating us all alike is the appropriate way to attack illegal immigration, and I will be delighted to answer any questions.

Mr. SMITH. Thank you, Professor Jordan. Let me say I may well quote you on your kind words about the immigration reform legislation that we are trying to move forward.

To my colleagues, I hope that the panelists can stay for questions. If not, we appreciate very much your being here. We will recess until after this vote.

[Recess.]

Mr. SMITH. The subcommittees will reconvene. We will finish up with questions for the two remaining panelists who are here from the first panel. After that, we will go immediately to our second panel.

Let me say, although there are not very many Members here to hear it, that the questions will be first by the chairmen of the committees, then the ranking minority members. After that, we will go in the order in which members arrived, to try to be fair to those members.

With that, let me ask a couple of questions. Then we'll go to Mr. Serrano, and then to Mr. Canady.

First, Mr. Bilbray. I wanted to ask you about your feelings toward the 14th amendment and whether you agree with some of the other panelists that the 14th amendment gives an absolute right to anyone who is born in the United States to become a citizen.

Mr. BILBRAY. Well, Mr. Chairman, you have got to remember that people refer to the British common law as their justification that everyone born on the soil is automatically a citizen. But if you go back to the *Calvin* case, it conditioned that citizenship based on being obedient to the jurisdiction and the sovereignty of the crown, which would then be turned around, and saying look, if you are in the realm, you are there under the authority and with the permission of the crown or of the country. British common law contains a conditioning clause that everybody who attacks my legislation keeps referring to. It says that you must be obedient to the crown to be able to claim to be a citizen. If you want the rights, you must assume the responsibility.

If my opponents' definition was so true, then why don't the children of diplomats have automatic citizenship? If it was so absolute, I challenge them. If it is so absolute, why don't the children of diplomats have automatic citizenship? The fact is, they don't because British common law that they keep referring to is not absolute in itself. I think that just because we have had this misperception for all these years, does not make it right. We need to go back to that basic concept that what is right is right. We need to move from there.

Mr. SMITH. Thank you, Mr. Bilbray.

Mr. Gutierrez, let me see if this is fair to say. There aren't very many things that everybody is going to agree on today, but perhaps one is that when the 14th amendment was passed, there was no intent at that point that it be applied strictly or inclusively to chil-

dren of individuals who are in the country illegally, simply because that class of individuals did not exist.

Let me summarize, as I understand it, the three reasons why most people feel or many people feel that if we are going to change the 14th amendment in one way or the other, by statute or by constitutional amendment, that it should be changed. The first point made by a number of people is that as it now stands, it is a reward for entering this country in violation of our laws and that that is patently unfair. It is unfair to those who are currently citizens. It is also unfair to the millions of people, legal immigrants, who are waiting to come to our country.

The second point generally made is that the cases end up rewarding parents economically as well for being here illegally, because they will benefit at least indirectly by the benefits going to the children.

The third point is that illegal immigrant parents are further rewarded because typically, if they have a citizen child, they are not going to be deported. So that that protection is another benefit that they enjoy, but to which they may or may not be entitled.

I would just like to ask you to respond to those three main points as to why the 14th amendment should be changed.

Mr. GUTIERREZ. It seems to me that No. 1, you can not condition or attempt to condition or affect the conduct of adults through an action upon a child, an infant child, someone who is just born, because that child is not responsible for the actions of the parent. I think that is basically what you do. So I don't think you achieve a goal of limiting undocumented people from coming into the country because of that, because one does not—and I think it's fundamentally unfair and I think constitutionally, I think one could argue that our courts have already stated that an illegitimate child has the same rights as a child that is born out of parents that are married, and that you can not treat them differently.

Second, I think it's a mis—people don't come here to this country to have babies. People come to this country in search of greater and better economic opportunities. So it would seem to me if you really want to address the issue of undocumented workers coming to this country, that what you would do is enhance the economic opportunities, the standard of living in the countries of origin of those undocumented people. Why do I say that? Because that is why people come here historically. If the conditions are good or better in the country of origin and are improving there, there is a less of a likelihood of people coming here illegally.

Mr. SMITH. One more quick question. I think that's true. You have the push pull factors. You have the push factors from other countries. You have the pull factors in the United States. The two magnets that are drawing individuals or attracting individuals to the United States are the availability of jobs and the access to Federal benefits. Would you be in favor of trying to reduce the attraction of those two magnets in order to reduce the number of individuals who would be seeking to come to the country?

Mr. GUTIERREZ. I would think that it would be more beneficial if we were to improve the working conditions in the country of origin of the people. I would certainly consider—number one, I don't believe today that people that are here illegally or undocumented

receive those benefits. It has been my history in my congressional district that number one, people are deported from the United States of America, even though they do have children that are citizens of this country, born in this country. So it has been my experience. I don't know if it's the experience across the country.

I can only tell you if you were to call to testify the Immigration and Naturalization Service regional office in the city of Chicago, they could give you an unlimited number of cases in which adults with children which are U.S. citizens have been deported from the country.

Mr. SMITH. Thank you. I have less than a minute to go. Mr. Bilbray, I just wanted to ask you in your experience in California, do you feel that individuals are enticed to come to our country illegally because of the promise of the easy availability of benefits and the easy access to jobs?

Mr. BILBRAY. Mr. Chairman, thank you very much for asking me that question. As a county supervisor for 10 years in the county of San Diego, with 2.7 million people, who operate this health care system in that region, that anyone who wants to come to the emergency rooms and the hospitals of San Diego and see what we see going firsthand, see what we see in the parking lot waiting for a young lady to dilate, just so she can deliver her baby in a U.S. hospital. The fact is, that is a situation that exists in my communities. Now I'm not going to argue about anybody else. But if anybody wants to come to San Diego and try to argue that this is not an attraction, then I would ask them to look at the documents that we have from Mexico that advises women on how to cross the border, how to get into the United States, and how to present themselves for delivery for an American child, and then to be able to access the welfare system because they then are parents of a U.S. citizen.

I don't think we should blame this though on the illegals. I think we need to blame this on the fact that we have created this problem. They haven't. They have only taken advantage of a situation which we have created for ourselves.

Mr. SMITH. Thank you. Let me yield to the ranking minority member of the Immigration Subcommittee, my colleague from Texas, Mr. Bryant, for 5 minutes.

Mr. BRYANT of Texas. Thank you, Mr. Chairman. I want to say up front I think these proposals are wrong, and that the way to deal with this problem is to stop illegal immigration, which is exactly what the bill we are bringing to the floor here in the next several months is aimed at doing.

Second, I think that the ease with which people nowadays propose amendments to the basic document, this governing document of this country, the Constitution, is alarming.

I'd like to ask with regard to Mr. Bilbray's proposed statute, and I think one of the other constitutional amendments as well, let's talk about Mr. Bilbray's statute. How can it be fair or legal to say that a mother has the capacity to convey citizenship to her child but a father can't?

Mr. BILBRAY. The fact, first of all, the fact is that the mother is who is delivering, basically presenting herself for delivery. It tends to be the nexus to be able to identify. I think we still, contrary to what Ms. Jordan said, is that the fact of other legislation pertain-

ing to citizenship, such as the father being an American citizen, we're not affecting that right. If the father is a United States citizen under other law that we have passed as a Member of Congress, that still applies. All we are saying though is just by her being present on U.S. soil is not an absolute. That we still have the condition that she has to respect the sovereignty of the United States, and under the obedience of the United States as stated by the constitutional amendment and stated by British common law.

Mr. BRYANT of Texas. Well, I am clear on what your proposal is, it just seems to me that you can't have a situation in which a mother can convey citizenship but the father can't. It would still have to be consistent with the equal protection clause of the Constitution. In addition to the problem that I think the statute has with the fact that the Constitution already describes how citizenship is to be conveyed.

Mr. BILBRAY. Congressman, if a father can convey citizenship based on other statute, this statute would not affect it at all. It obviously would apply. All it comes down to again, is that the mother's status under the jurisdiction on the obedience of the Federal jurisdiction is a condition of the 14th amendment. That condition is just as powerful as the condition that says if you are born here.

Mr. BRYANT of Texas. It seems clear though, just from the fact that we are having the discussion, that this is going to lead to an enormous amount of litigation. I mean this is going to be up and down through the courts for years every time one of these things is contested. Why not just deal with this by stopping illegal immigration so you don't have the problem?

Mr. BILBRAY. Well, first of all, let me point out that the reference in my bill does have a reference to parents. What is happening in San Diego and still can happen is that people can get a temporary status to come to work. That status then is used to be able to come in and deliver for birth. Then the claim all at once is a vested right. Those individuals who are claiming that right are not under the authority, are not treated the same as resident aliens and citizens. I want to clarify that.

Unlike other proposals, and as being a child of a resident alien, I really believe strongly in fact that those resident aliens who have gone through the rules, who are under the jurisdiction, their children should have the same rights. This clause under the jurisdiction applies to them. They serve jury duty, they pay their taxes. They do everything like a U.S. citizen. They can be drafted, even if they are not a citizen.

Mr. BRYANT of Texas. Why couldn't you just say that people with temporary status can't be granted temporary status if they are obviously in the third month of being pregnant or something like that?

Mr. BILBRAY. No. Wait a second. You have got to understand. In San Diego, they can have a temporary visitor's card just to come shop. We allow this constantly. The majority of crossings across the Mexican border, Tijuana, the largest port of entry in the world, is basically people that are on one day access in and out. During that time, they then take advantage of the opportunity and use that opportunity as a way to leapfrog over the system, while you have other people that want to immigrate legally waiting patiently in Ti-

juana for the proper papers to be able to enter and gain resident status.

Mr. BRYANT of Texas. But I would think you could find some way to screen the people that you are granting those cards to, that virtually anything would be preferable to amending the U.S. Constitution.

I know you think your statute does it without that. But I don't see how it can possibly work without an amendment to the Constitution.

Mr. BILBRAY. Well my point again though is the fact that you say that based on an assumption that the Supreme Court has ruled on this. What I am telling you, Congressman, the Supreme Court has never ruled on this. They have never ruled on a child of an illegal alien.

The Wong Kim Ark that is referred to all the time was legal residents who had chosen to come into the country by the United States, let them in. In fact, the reference to Senator Howard, the author of the 14th amendment, said quite clearly that what he wanted citizenship to was the people who we've chosen to be on our soil. In fact, he even referred to the slaves as being forced to come here. Because we chose for them to be on our soil, we owe their children automatic citizenship. That applies to Wong Kim Ark, but it does not apply to illegal aliens. That is the difference.

Mr. BRYANT of Texas. We chose to let an awful lot of them come in here to work cheap on the farms in southern California. In fact, we had much of them in front of this committee here just a few days ago, hoping to do more of that.

Do you think their children ought to be able to be citizens if they are over here working cheap?

Mr. BILBRAY. My legislation would not affect those who are already on U.S. soil. I'm sure there are those who will argue that through our lack of attention to immigration, that we have de facto through our negligence consented for them to be on our soil. That argument can be used for existing children of illegal aliens residing in the U.S. I think we all agree that from this time forward, Congress is no longer going to be negligent and no longer is going to de facto consent to them being on the U.S. soil. The fact is, our immigration law should reflect that change and reflect the fact that anyone on U.S. soil without our consent is not going to be rewarded for violating the law while we ask those who are trying to live by the law to wait. We are punishing people for doing the right thing, and rewarding the parents, not the children.

Mr. BRYANT of Texas. I know how good it sounds. I just think we've got to be cognizant of the fact that you are going to have litigation in every one of these cases. The best way to deal with this is to stop people from coming here illegally.

Mr. GALLEGLY. Would the gentleman yield?

Mr. BRYANT of Texas. Sure.

Mr. GALLEGLY. You asked Mr. Bilbray about farm workers or whatever. The legislation that I introduced some 5 years ago and have worked on, merely states that the mother must show proof of having a legal basis for being in the United States. I would assume by the nature of that, if they are legally here working in a pro-

gram, if they are on a visa or whatever, that would qualify so that they would not be exempt from the automatic citizenship.

Mr. BILBRAY. Mr. Chairman, I think there needs to be a clarification for those who are not exposed to this situation. But there is a quite clear line in our justice system between those who are legal residents and those who are citizens and those who are legal aliens and tourist aliens.

When you get tried for a misdemeanor in San Diego, if you happen to be a tourist or an illegal alien, the first opt of the justice system is to deport you rather than prosecute you. Where if you are a resident alien or a citizen, you are prosecuted. Now unless you recognize that as being a unique separation by constitutional questions, you could have a situation where a resident alien or a citizen could sue for the violation of their constitutional rights under equal protection under the law. The reason why you don't see that is that the Constitution and the law specifically separates those two.

All we are saying is that the 14th amendment recognizes that separation. It does not violate equal protection. Thus, we should make that consistent.

Mr. SMITH. Thank you, Mr. Bryant. Mr. Gallegly is recognized for 5 minutes.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Mr. Gutierrez, you mention in your opening comments that you, speaking on behalf of the Hispanic Caucus, opposed, and you mentioned the legislation of I believe three Members, Mr. Bilbray, myself, and I believe one other, I didn't write it down. But if my memory serves me correctly, those are all Republican Members. Was the exception of Mr. Beilenson's amendment, which has been on record for a long time, for partisan reasons or do you embrace his?

Mr. GUTIERREZ. No. I do not embrace Mr. Beilenson's arguments either, Mr. Gallegly. I stand corrected. I hope the record would show and amend my opening statement to reflect Mr. Beilenson's also.

Mr. GALLEGLY. OK. I have a brochure that is coming over from my office that I would like to share with some of you. There has been a lot of comments about the fact that women do not come into the United States purely for the purpose of getting the birthright citizenship for their child and all of the benefits derived. We have statements on record in Los Angeles and San Diego County where the women have volunteered that their principle purpose of coming to the United States, clearly a third of them that are in the country illegally, have stated that they are here principally for the purpose of that citizenship. In the case of California, they receive $670 a month for AFDC, public housing and so on and so forth.

This brochure that I am going to present, that I would like to be made a part of the record, has been printed by the—I believe it's the county of Riverside, it's either Riverside or San Bernardino County, in both Spanish and in English, and it's circulated all throughout Mexico. It is a bulletin advising women you do not have to be an American citizen. In fact, even if you are illegally in the country, you are entitled to all these benefits. And in fact, it is a violation of the law for someone to turn you in as being illegal. So if you do say that you are in the country illegally, they can't do anything with you, and advise folks accordingly.

Don't you believe that that is an incentive for people to illegally come to the country?

Mr. GUTIERREZ. It has not been my experience. Nor do I believe that people sit on one side of the border, sit down, make love, procreate, wait 8 months and I don't know how many days, and then decide to skip over the border to have. I mean, I know that people come to this country in that fashion. The other thing I think is that the last time I checked, the vast majority of people who were in this country undocumented do not come through the border. That even if you were to eliminate all access, because there is always a lot of focus on the border between Mexico and the United States. Sometimes, it makes people such as myself with a name like Gutierrez, a little wary when everybody focuses on the Latin American issue of immigration to this country, when we know that indeed if you stopped that, the majority of people who are here undocumented in this country would still be here.

So I don't believe that that happens. People come here to work hard, to sweat, and to toil and to contribute. The other thing, Mr. Gallegly, is that it has been my experience that having a child born an American citizen of an undocumented person does not guarantee that that person is not going to be deported from the United States of America. There is absolutely no guarantee. As a matter of fact, it doesn't exclude them from deportation. Maybe I am wrong, and maybe they are just violating the law, and I'll call up my INS office in Chicago and say, "Stop deporting the parents of undocumented workers who have children born in the United States of America." It is just not happening.

The other thing is, how do they access the benefits when indeed they can be deported and they can be denied benefits, because they have no statutory, how would I say, guarantee to any of those benefits. They are disallowed.

Mr. GALLEGLY. Mr. Gutierrez, I only have about a minute left. For the record, Mr. Chairman, I would like to ask that the committee with unanimous consent allow these two pamphlets, both in Spanish and in English be made a part of the hearing.

Mr. SMITH. Without objection

[The information follows:]

You Can Apply For Medi-Cal At Any of These Offices
Department Of Public Social Services

1300 E. Mt View Street
Barstow

320 E. "D" Street
Ontario

7797 Sierra Avenue
Fontana

494 North "E" Street
San Bernardino

515 Orange Street
Redlands

16515 Mojave Street
Victorville

1111 Bailey Street
Needles

5631 Pima Trail
Yucca Valley

For Care During Your Pregnancy
Department of Public Health
Maternal Health Program

Chino Health Center
13260 Central Avenue
(714) 391-7530

Clinical Services Building
799 East Rialto Avenue
(714) 383-3033

Fontana Health Center
17830 Arrow Boulevard
(714) 829-3733

Victor Valley [illegible]
16453 Bear Valley Rd., Hesperia
(619) 956-4446

Ontario Health Center
320 East "D" Street
(714) 391-7530

Whitney Young Clinic
1755 Maple Street
(714) 383-3033

Redlands Health Center
222 Brookside Avenue
(714) 383-3033

Joshua Tree Public Health
6527 Whitefeather Road, Joshua Tree
(619) 362-4604

Or Call Toll Free 1-800-227-3034 For Prenatal Care Referrals.

Developed by:
Maternal Health Program
San Bernardino County
Department of Public Health

6/89

MEDI-CAL HAS GOOD NEWS FOR PREGNANT WOMEN

You Do Not Need To Be A Citizen To Get Medi-Cal

63

58

The Law Has Changed.

The new law will help you if you are going to have a baby. It allows Medi-Cal to pay for the doctor and the hospital during your pregnancy. Even if you have applied for amnesty or are in the country illegally, you can now receive a special kind of Medi-Cal.

If I Apply, Will It Affect My Amnesty?

NO! As of October 1, 1988, you may apply for this special Medi-Cal without it affecting the amnesty process.

If I Am Here Illegally, Will It Be Reported To Immigration?

NO! Under the new law, Medi-Cal cannot report you to immigration for applying for, or receiving Medi-Cal while you are pregnant.

How Do I Apply?

Go to the nearest Medi-Cal office. Ask to apply for restricted benefits (pregnancy only).

When You Apply, Bring The Following:

1. Some form of identification.
2. A Social Security Card (not required for restricted benefits).
3. You also will need proof of your income and any property you own.
4. You will need a letter, from your doctor or the clinic, saying you are pregnant.

What About Share of Cost?

Effective July 1, 1989 there is a new program for pregnant women. If you meet the income requirements, you will have no share of cost for pregnancy related services only. If your income is more than the Medi-Cal limit, you will have a share of cost.

REMEMBER!

The information you give to the worker is confidential. It will not be reported to Immigration.

Good medical care during your pregnancy will help you have a healthier baby. See a doctor regularly and keep all your appointments.

Medi-Cal can help pay for the hospital when the baby is born. It can also help you pay for any emergencies during your pregnancy.

Puede Aplicar Para Beneficios de Medi-Cal en cualquiera de estas oficinas del Departmento Publico de Servicios Sociales

1300 E. Mt View Street
Barstow

7797 Sierra Avenue
Fontana

515 Orange Street
Redlands

1111 Bailey Street
Needles

320 E. "D" Street
Ontario

494 North "E" Street
San Bernardino

16515 Mojave Street
Victorville

5631 Pima Trail
Yucca Valley

Para Cuidado Durante Su Embarazo
Department of Public Health
Maternal Health Program

Chino Health Center
13260 Central Avenue
(714) 391-7530

Fontana Health Center
17830 Arrow Boulevard
(714) 829-3733

Ontario Health Center
320 East "D" Street
(714) 391-7530

Redlands Health Center
222 Brookside Avenue
(714) 383-3033

Clinical Services Building
799 East Rialto Avenue
(714) 383-3033

Victorville Health Center
15347 Sixth Street
(619) 245-3167

Whitney Young Clinic
1755 Maple Street
(714) 383-3033

O llame gratis 1-800-227-3834
PROGRAMA DE SALUD MATERNA
Departamento de Salud Pública
Condado de San Bernardino

6/89

MEDI-CAL TIENE BUENAS NOTICIAS PARA MUJERES EMBARAZADAS

No Tiene Que Ser Ciudadano
Para Reciber Medi-Cal

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23-492 O - 96 - 3

Hay Una Ley Nueva.

La ley nueva puede ayudarle si usted va a tener un bebe. Deje que Medi-Cal cobre sus costos medicos y del hospital durante su embarazo. No les afecta si han solicitado para amnistía ó si no tenga papeles. Ahora puede recibir una Medi-Cal especial.

Si solicito Para Medi-Cal, Afectará Mi Amnistia?

NO! Desde el 1 de Octubre de 1988, puede solicitar para este Medi-Cal especial sin afecte su aplicacion de amnistía.

Si No Tengo Papeles, Le Avisaran A La Inmigracion?

NO! Bajo la nueva ley no será reportado a la oficina de Inmigración, si apliques or si usted reciba beneficios de Medi-Cal.

Como Aplico?

Es seguro. Toda información es confidencial. Puede aplicar an la oficina de Medi-Cal mas cerca de usted. Si es la primera vez que aplica para Medi-Cal, el trabajador de Medi-Cal, le ayudará a solicitar para Medi-Cal y contestará todas sus preguntas. Asegurese de decir al trabajador de Medi-Cal que solo quiere beneficios para el embarazo. Si usted aplico antes, regresca al mismo trabajador.

Cuando aplique traíga con usted lo siguiente:

1. Alguna clase de identificación.
2. Una tarjeta del Seguro Social (no es necesario para estos beneficios limitados).
3. Tambien necesita alguna clase de prueba de lo que gana y de sus propiedades.
4. Necesita una carta, de un doctor o clinica, diciendo que usted está embarazada.

Que acerca de su porcion de obligacion?

Efectivo el 1 de Julio, 1989, las reglas sobre los ingresos para las mujeres embarazadas van a cambiar por lo mejor. La mayoria de mujeres embarazadas no van a tener que pagar su porcion de obligacion por los servicios acerca del embarazo.

ACUERDESE!

La información que da al Trabajador es confidencial. No lo reportaría a la Inmigración.

Para tener un niño sano, es importante recibir un buen cuidado médico durante su embarazo. Vea a un doctor regularmente y vaya a todas sus citas.

Medi-Cal puede ayudarle a pagar el hospital cuando nazca el bebe. Tambien puede ayudarle a pagar cualquier emergencia durante su embarazo.

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Mr. GALLEGLY. I would also like to ask Mr. Gutierrez just one final question. All of the numbers that we have, and of course California I think is impacted more significantly maybe than other States, largely due to the fact that our welfare benefits, AFDC is significantly more than most other States. I think the difference in California and Texas, for instance, and maybe the gentleman from Texas, our chairman, could correct me. But it is my understanding that in Texas AFDC is like $230 or $240 dollars a month, where in California it's $670.

But in California, according to all of the statistics and numbers that we have for the last 5 years, over two-thirds, over two-thirds of all of the births in Los Angeles County operated hospitals, the indigent hospitals fully funded by taxpayers, the mother openly admits that she's in the country illegally. In fact, in the last 2 years, the county hospitals can not provide enough service. They are having to subcontract out to private hospitals. Statewide, the Medi-Cal hospitals, statewide over 40 percent of all the births in the largest State in the Nation, the mother is in the country illegally. The overwhelming majority of those do take public benefits. You have to acknowledge that is a tremendous incentive.

Mr. GUTIERREZ. Mr. Gallegly, it is very difficult for me to respond to the issue of California, as I do not know it as well as I treat the issue of immigration. I can only tell you that in each and every instance in which I have confronted the issue, I find people who come undocumented from—in Chicago it's from Poland. I assure you that it's from Mexico. It's from Europe. I invite everyone to come to my district and see the people that come. They come to my office all of the time, Mr. Gallegly, saying here is our problem. But I find that they are all working. They are all working. They all have jobs. They all contribute.

So if we were to make an analysis like the undocumented person who lives in the Fourth Congressional District or probably out in California probably has a job, pays Social Security, pays income taxes, State, pays Federal taxes, but does not have the same right to the benefits that should be derived by payment of those taxes. So it is almost as if they are here, they are living under welfare, they don't work and they don't contribute, but they do.

Mr. GALLEGLY. The only question, and I know I'm about out of time. But the question, Mr. Gutierrez, if in fact they are working and they can provide for themselves, they would not qualify for indigent health care. So based on that, how do you explain over two-thirds of all the births are illegals that are indigent, and on the statewide basis, people that qualify for these programs are not working, or either they are lying about their income and getting the Federal benefits, because they show that they are not qualified by having enough income to provide for themselves.

Mr. SMITH. We're going to need to move on. Thank you, Mr. Gallegly. Perhaps you can take that up on the next question.

Mr. Serrano.

Mr. SERRANO. Thank you, Mr. Chairman. Let's first of all understand what I always try to explain at the beginning of my comments whenever we have this kind of a conversation. This issue is part of the misguided immigrant bashing that is taking place in this country. A lot of well-intentioned people who really want to

deal with immigration, which they perceive to be a major problem, when in fact it isn't, think that by making English the official language or stopping all immigration or beginning this new conversation, we will somehow deal with this issue.

The fact of life is that this is also directed at the perception that there is a large number of Hispanics arriving in the country. This is not about people coming from Europe. I will argue that to my last day in Congress and maybe to my last day here on earth. If everyone in this country were coming from Europe right now, we would not be having these discussions right now. We're concerned about language and the browning of America.

Now, it's interesting that some articles have been written in New York papers that indicate that if we really study New York City's undocumented population, you find Ireland and Italy higher up on the list than the Dominican Republic and Colombia. But no one is discussing that. They are discussing bilingual education in the schools as an issue.

It is also ironic that we discuss this issue when the country was founded by illegal aliens who had no right to be here, just showed up at Plymouth Rock and at other places, in Augustine, FL. And then there are parts of the country, the Southwest and West; those lands were taken by us from Mexico. So there are two ironic points that we have to deal with on this issue.

But of all the discussions we have had, this is the one that troubles me the most, because I believe that citizenship is too serious an issue for us to lightly tinker with. I personally have some very serious problems with the issue of tinkering with anyone's citizenship. We have traditionally said, "If you are born here, our Constitution says you are an American citizen." Now we're going to say, "However, because we have this concern about who is arriving in this country, we are going to stop you at the pass, cut you off at the pass. We're going to say if you are born here from undocumented parents, you are not a citizen." That opens up a whole new situation which is very difficult for us to deal with.

Now here's my concern. How the heck do you enforce this? Lincoln Hospital in the South Bronx has more births than anywhere in New York City. "Dr. Smith, this one looks dark. Check him out." "Yes. But his mother is speaking English. He doesn't speak Spanish." "Well, where is she coming from? From a British Colony?" Who makes that determination? "This one is light-skinned. He's probably ok, he's probably a citizen." Boy, are Puerto Ricans going to be in trouble, because we come in all colors, and citizenship is not the issue.

Who makes that determination? Is it the nurse? The doctor? Will the social worker now in charge of not allowing a baby out of the hospital without proper documents be denying documents? How far do we carry it? Does the hospital want to get into that situation or does the hospital deny a woman in labor admission for the birth because we can't determine who the child is?

I always tell you that this is also unfair to certain citizens in this country. I assure you that if Mr. Gutierrez and his wife show up in the Bronx or I show up and sign up with my last name, they are going to start asking me questions and not asking someone else questions about whether that baby is going to be a citizen or not.

So you see, enforcement makes no sense. But the style in Congress now is, "Let the States decide. Let the States determine what will constitute prayer and desecration of the flag and what constitutes a citizen."

My friends, this one is serious. This one is too serious for us to fool around with.

And let me give you my personal concern, which is self-serving, I admit, but serious. Mr. Gutierrez, where were you born?

Mr. GUTIERREZ. I was born in Chicago.

Mr. SERRANO. I was born in Puerto Rico. Yet you and I, because of the unique relationship between the United States and Puerto Rico find ourselves not only American citizens and proud of it, but very much part of the so-called Puerto Rican community throughout the Nation, and we keep very close ties to the island. Am I correct?

Mr. GUTIERREZ. Yes, sir.

Mr. SERRANO. My citizenship is not protected like yours in the Constitution. My citizenship comes about, it is my opinion—and you're the expert on this, that's why you are sitting there, testifying on behalf of the caucus—my citizenship comes about because of the Jones Act in 1917, which declared all Puerto Ricans citizens.

Interestingly enough, the House of Delegates left over from Spain voted unanimously to reject the citizenship. Congress came back and said "Well, we have a war going on and it's embarrassing to send you without your being citizens." At any given moment, if we opened this subject up—don't take this lightly—someone could decide that citizenship conferred by law and not by the Constitution can be revoked. Now I know some of you would love me to leave Congress but most of you wouldn't.. What happens when we begin to open up this subject? So I would hope that we don't take this lightly. This is a serious, serious issue.

Mr. GUTIERREZ. Of course, if they revoked your citizen under the statute in 1917 Jones Act, they would revoke my parent's citizenship. Therefore, I guess I would not be under the law here when I was born in 1953 because if they revoke yours, they revoke my parents. I don't know what happens to my standing, because I therefore was not born of citizens of the United States of America.

Mr. BILBRAY. Mr. Chairman, the *Wong Kim Ark* case clearly says that at the time of birth, if you are under the jurisdiction you can't take it away after the time of birth.

Mr. SERRANO. No, but you see, Mr. Bilbray, my question for you is, does your legislation, or any of the other legislation here, in your opinion—this is an easy answer for you, but I just want you on the record—in your opinion, open up the discussion of citizenship where it is not protected by the Constitution? Since we're going to see so much litigation under these bills that we're going to go crazy in the course of discussing citizenship, can not the Jones Act become part of the litigation? The question has to be asked.

Mr. BILBRAY. Mr. Congressman, my bill does not affect any other citizenship legislation. I just ask you, is that you have the assumption that everyone born on U.S. soil are U.S. citizens and that anybody who would say otherwise is prejudiced. Let me point out, the children of diplomats do not qualify for automatic citizenship. That

condition in my opinion does not reflect prejudice. It reflects the Constitution of the United States and the conditioning clause of the automatic citizenship.

Mr. SERRANO. That reflects an understanding that you are here in a certain situation. What we are talking about is people who make a decision in their life—granted, our problem here is that rather than dealing with undocumented immigration at the source or at the border, we're always dealing with the issue at the end. People make a decision to leave their home and come to this country. Then later on, they give birth to someone. You are now questioning that citizenship. That is a very serious issue. It is unlike a person coming here as a diplomat for a temporary stay.

Mr. BILBRAY. I know that you agree though that a diplomat's child is not given automatic citizenship.

Mr. SMITH. Mr. Bilbray, let me push on. The Chair has now extended to the gentleman twice the normal amount of time. I would like to move on to get everybody.

Mr. SERRANO. I was going to ask one more question of Mr. Bilbray.

Mr. SMITH. Mr. Serrano.

Mr. SERRANO. Mr. Bilbray, you said that you were born of undocumented parents?

Mr. BILBRAY. No. My mother was an immigrant from Australia.

Mr. SERRANO. And was not a citizen?

Mr. BILBRAY. She got her citizenship. In fact, she was the first war bride to get her citizenship after World War II.

Mr. SERRANO. But she was not a citizen when you were born?

Mr. BILBRAY. My mother was taken off of the military base until she got her citizenship, and just before my brother was born, she was removed because she was not a citizen. She was a resident alien, and she was removed from the naval reservation until she got her citizenship just before my older brother's birth so my brothers and I could be born at North Allen Naval Air Station because she had received her citizenship.

Mr. SERRANO. After you were born?

Mr. BILBRAY. No. She got it just before my older brother was born.

Mr. SMITH. Thank you, Mr. Serrano. Mr. Bono.

Mr. BONO. Thank you. You know, I've been sitting on these panels now for a long time. What is unfortunate is that these don't become practical issues, and they are practical problems. They become emotional issues. My father was an immigrant. I'm Italian. You mentioned Italians. I think we're the most benevolent country in the world. Let me ask you something, Mr. Bilbray, being close to Mexico. How loose are the immigration rules in Mexico? Are they as open-minded about regulations as we are in the United States?

Mr. BILBRAY. Mr. Bono, as somebody who has not only lived on the border but worked with Mexican officials for over 20 years, let me just tell you. Mexican immigration law is so much more reasonable, logical and fair than our system is right now, that anyone who wants to point at Mexico and somehow put them down for their immigration law really needs to take a second look. I do not believe Mexico as a nation or the people of Mexico or Latin Amer-

ican bear the responsibility here. I think they have set an example in many cases that we could learn from.

Mr. BONO. Good. Why would you not consider your legislation punitive against innocent children?

Mr. BILBRAY. Well, Mr. Bono, I think that we have got to point out that I don't believe that the condition that does not give automatic citizenship to the children of diplomats as being punitive or prejudiced against the children of diplomats. All we are saying though is that we are not going to reward people for violating the sovereignty of the United States and we're not going to automatically give something to someone that is breaking the rules, while we punish people de facto by not giving citizenship to those who are waiting patiently. It really comes down not just to British common law, but to common sense. You do not stop people who are playing by the rules and deny them something that you are going to reward somebody with for violating. It is the parents and the status of the parents that we really need to determine. Common sense and common decency says you do not punish people for doing the right thing and reward people for doing the wrong thing.

Mr. BONO. I don't see how we can ever resolve issues when the position becomes one of a certain group of people addressing it because it is a practical problem. Then the other group that considers themselves victims of these people who consider themselves having a practical problem and emotional problem to discriminate against people. I just don't believe that in America. Maybe I am extremely naive. But I find it difficult to think that. I don't think this issue would be discussed if it weren't a practical problem that existed in this country, or at least in Los Angeles or California. Would you agree?

Mr. BILBRAY. Let me just say I agree to the fact that if people will look at the true problem, quit trying to make it an issue of prejudice back and forth. Look at the logic. As somebody who lives in a working class neighborhood, who has provided service to the working class, I find it really hard for us to look at something like the allocation of Medicare funds for the needy and the poor of this country and see the great statements that are going around about how we are going to provide these services to our citizens, and at the same time, ignore the fact that 40 percent of the Medicaid births in California are to people that are not even supposed to be in the country. And we're at this point to where we are drawing this line.

It is easy, frankly. I'll be very blunt. It is easy for the rich and powerful to talk academic about these issues. But if you are needy, if you are somebody of color, you are somebody in a community that needs these services, if your hospital is the one that is being impacted, because it's not impacting the rich neighborhoods, it is the poor neighborhoods. If your neighborhoods are being impacted, you are the ones that are going to have to stand up and talk about it. I happen to be somebody who not only lives in those neighborhoods, but actually represent those neighborhoods. I think a lot of people feel that if this were happening to the rich neighborhoods, there would be hell to be paid. There would be more done on this thing. I think it is only fair and equitable that we talk about the appropriate way to apply these laws.

Mr. BONO. Thank you. I just want to make one closing statement, if I may, Mr. Chairman. I am not a person who discriminates. I don't consider myself mean. I don't want to hurt anyone. But there are problems that I wish we would all address and all recognize that these problems do exist, and everybody would contribute to these problems rather than just saying you're a mean guy and you want to discriminate against me because I am a certain nationality. I think that is being a victim.

By the way, I work for cheap wages. Somebody mentioned cheap wages like it was a dirty word. I worked for cheap wages for a long period of my life. I worked through those cheap wages and achieved more. But I had the opportunity to do that. So it's an insult to everybody to work for a few bucks, the amount of bucks that could be afforded to pay you, I don't consider that an insult. Again, I just want to say I wish we would all recognize these are problems that have evolved throughout history of our country now, and they have changed since the Constitution. They do need alterations. To assume that everything will stay the same is a false point of view and totally unacceptable in the real world. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Bono. As I mentioned earlier, we are going to take members in the order in which they arrived when we began the hearing today. That means that Mr. Becerra will be up next, Mr. Bryant, and then Mr. Watt, as things now stand.

Mr. Becerra is recognized for 5 minutes.

Mr. BECERRA. Thank you, Mr. Chairman. Before I ask any questions, and I hope we get to questions, I am fascinated that several members mentioned that polls, opinion polls taken in their districts or in their States have shown that the public by some overwhelming majority would like to do certain things, whether it's restrict citizenship status for children born in this country or otherwise, whether it's—in some cases proposition 187 was shown in the polls to be dramatically supported by the public. I never realized that coming to Congress that I was obligated now as a Member of Congress to follow the dictates of a poll. I suspect if we were to do that, last year we'd have a President by the name of Robert Dole, and this year we would have a President by the name of Bill Clinton.

It seems to me as well, that if we were to look only at polls, it could very well be that African-Americans would only barely be finding that they have the franchise to vote. When you take a look at the *Dred Scott* decisions, the Supreme Court of the United States somehow found a way to tell a very large percentage of the population in this country, one that had worked very, very hard, and in many cases against its will, that it could still not vote even though the Constitution of the United States was allowing most others to vote. It seems to me that the *Dred Scott* decision perhaps best epitomizes a situation we find ourselves in periodically, where we are driven by the public opinion more than by rational policy.

So I would hope that we don't find that *Dred Scott* is a rational basis for anything to be done these days for anyone born in this country. It seems to me that everything I have just said applies to just the right to vote as well. I don't think that we would find much progress in this world if we would have taken polls in 1954 if peo-

ple thought that *Brown* v. *Board of Education* was a good vote. There are a lot of other decisions.

It seems to me that when you get elected to Congress or if you get the privilege to serve in a high place like the Supreme Court, you are asked to try to help formulate policy for this country that will hold, if not as long as the Constitution, perhaps somewhere close to it so that we are a nation of laws.

Let me ask a couple of questions. Unfortunately only two of the members are left, but do either of the two members take the position that they by accident of birth are also U.S. citizens?

Mr. BILBRAY. I would not use the term of accident of birth. I would say through the conscious effort of my mother I was born on U.S. soil, specifically because of her conscious effort at not only immigrating but nationalizing. Frankly to say this, is that the problems of an immigrant, legal immigrant, I am sensitive to too. Like I stated before, she was basically thrown out of navy housing because she was not a citizen. This issue of possible discrimination or possible dividing lines being made is not just one based on ethnicity. It is also based on status as a resident.

Mr. GUTIERREZ. I have a funny feeling if it were not for World War I and the fact that you had to draft literally tens of thousands of Puerto Ricans from the island of Puerto Rico, and therefore American citizenship was conferred that same year during World War I, that my parents would not be citizens of the United States, and that therefore, who knows? I might have come here as Dominicans have come here undocumented, as Mexicans have come here undocumented.

I mean I think the question is I'd like to do a survey at some point of all the people who are legal citizens, who are citizens of the United States of America whose parents came into this country undocumented or through some illegal vehicle, but who today are legally here in this country, and kind of make this retroactive to kind of say where do we begin? Because we all know that most people, a huge number of people come to this country undocumented. You know, they come on a visitor's visa, but they fix things. You know? We have the Amnesty Act of 1986. We do things to change things and people do become citizens. They get married. There are different vehicles that they use to become here legally. Their children therefore are conferred that legality unto them.

I always like to use the word undocumented, because I hate to think of a human being as being illegal. I think of actions as being illegal, of an act as being illegal. But a human being, it just somehow, an illegal human being doesn't fit well in my sense of definitions of people and things.

Mr. BECERRA. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Becerra. Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman. It is a pleasure to serve on this subcommittee. It's always very enlightening to hear different views and frustrations expressed by all parties to these issues. Certainly coming from Tennessee, unlike some of my colleagues from California or Texas, we don't seem to have the problem that those States have.

My constituency, while I don't think we govern by the polls, I think we are up here to represent our constituencies, and whether

it's by poll or how we determine what our constituency believes, I think we are under obligation to represent them. I think certainly every member in this room is doing just that.

But concerns, frustrations I hear in my district are about the types of statistics that the gentlemen from California both talk about. That is, roughly two-thirds of the births in indigent hospitals in Los Angeles County, fit into this category. Congressman Bilbray mentioned 40 percent, I believe, of the births in California on Medicaid are affected by this. How much longer can we support this type of situation?

I think Congressman Gutierrez mentions one possible option would be to perhaps help bolster the economies of Mexico so they wouldn't come over here. You know, at a time when we are struggling as a country to balance the budget and fighting over what money in the pie is divided, I just don't think that is feasible, that tactic. I think we have to tighten our borders. To me, and I respect all the folks on all sides of this issue because I know they are sincere about their position, but it seems to me we have to do everything we can to tighten up this situation. I want to remain legal on these, and I certainly am going to study the various proposals, the various versions here.

But I think the concept that is being offered here that offends so many people, particularly that I represent, again, is what Brian Bilbray said. You know, these folks are not even supposed to be in the country. It doesn't matter to me, and I don't think it matters to my constituents where these folks come from. I don't hear them talking about Hispanic populations or Latinos in Tennessee. It's that people are in this country illegally, whether they are from Ireland or Europe or Mexico, wherever, and they are on welfare. Again, the statistics speak for themselves. That appears to be accurate.

It so happens that a lot of these in Florida, Texas, and California, but I'm sure it's in other border States, the Northern border and Eastern and so forth. That is the frustration that is reaching me to cause me to want to support something like this. I think it can be accomplished in a reasonable manner. I think your comment that if we do it, we will increase the numbers of illegals in this country, I guess we're just redefining them. It's sort of like the theory that, well, we can cut crime by not calling certain actions, not calling them crimes any more so we lessen the amount of crime in the country. I don't think that will work, either. I think we've got to—Sonny Bono said we've got practical problems here that call for practical solutions. But we always end up taking the emotional side of it, everybody does. Somehow we have to overcome that. I am standing on my soapbox right now, but I think these folks have some very real problems.

Mr. GUTIERREZ. May I just take an opportunity to quickly respond?

Mr. BRYANT of Tennessee. Yes.

Mr. GUTIERREZ. I think that number one, you deal with illegal immigration to the country or undocumented immigration to the country by dealing with the problems at the source. The problems at the source—see as long as between at least the relationship in our hemisphere between Central and South America and Mexico,

as long as the disparity is so huge between the standard of living, the quality of life, and the possibility of success in life for yourself and your children is so different between one side and the other, you are going to have people coming here. You are not going to stop it. People are not going to say, "Oh God, my child won't be an American citizen. Therefore, let me not go to the United States of America." You still have hunger. You still have pain. You still have misery. You still have the expectation——

Mr. BRYANT of Tennessee. Assuming that we don't bolster these economies, what is your answer to this?

Mr. GUTIERREZ. I think we have a North American Free Trade Agreement, and so we need a hemispheric approach. Many times, we look at Asia, we look at Europe, we look at their models of economic development and engines at how they are beginning to work together. We need a hemispheric approach. We have to think of ourselves as Americans. I am an American, you are an American. But if you are from Central America or South America, from Canada, you are an American just as well. We live in a hemisphere. It is about time we began to work together.

Mr. BILBRAY. Mr. Chairman, if I may. In all fairness, we need a hemispheric approach. But need a hemispheric approach that recognizes that the United States is part of this hemisphere. It is not just Latin America. I believe in working with Mexico, but we also have to look at making sure that it is easier to stay in their home country. But also at the same time, we can't ignore the other half, the poll, which is to reward them for violating the law and to come here. You can't blame them.

In fact, there's a separate issue that I personally got involved with this. I wish you could recognize that there may not have been people killed this week in Bosnia, but there were four killed in my neighborhood over illegal immigration, killed on the freeways, drowned in the rivers. At the same time, recognize that this is not something that just affects the United States. As Governor Ruffo, the first freely elected Governor of Mexico in this century said, is that we are creating problems in twofold. One, we are depriving Latin America of the people that could force the social economic changes that are desperately needed in their part of the world. Second, is that we are creating problems to the frontier in Latin America. What he said is basically America needs to learn that sovereignty is not just a right. It is a responsibility. We are creating problems, not just on our side, but in Mexico's side.

I remind you, Mr. Chairman, there are nine dead police officers in Tijuana that were assassinated that was directly related to this problem last year.

Mr. SMITH. Thank you, Mr. Bryant. We are going to go to Mr. Watt. Then the Chair is going to indulge a colleague. I hope we have a couple of minutes to do so in case Congresswoman Mink has an observation or a question as well. We are going to finish with this panel before the vote. When we come back, we'll take up the next panel.

Mr. Watt is recognized for 5 minutes.

Mr. WATT. Mr. Chairman, I will try to expedite this and engage in the unprecedented act on my part probably of not asking either of these witnesses any questions. I would like to do two quick

things however. I would like to ask unanimous consent to submit Mr. Conyer's statement for the record since he was unavoidably detained.

Mr. SMITH. Without objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Although I share the concerns of the other members regarding the problem of women entering the United States for the sole purpose of giving birth to an American child, I cannot agree that a constitutional amendment is the solution to this problem.

The mere idea of amending the Fourteenth Amendment to the Constitution sends chills down my spine. The Fourteenth Amendment is of enormous symbolic importance—it defines the United States as a country committed to equality for all people.

The Citizenship Clause of the Fourteenth Amendment—which reads "all persons born . . . in the United States, and subject to the jurisdiction thereof,"—was written to repudiate the infamous Dred Scott Decision. This clause guarantees that the United States population will not contain a hereditary caste of non-citizens.

The repeal of the birthright citizenship clause of the Fourteenth Amendment would create a subculture of non-persons. This problem has been amply demonstrated in Germany where violent acts are frequently committed against Turkish people who are considered "immigrants" even though many of these people have lived in Germany for generations.

Looking at Germany as an example, I cannot countenance a constitutional amendment that will lead to even more racial strife than we already have in our country. It horrifies me to think that we would amend the Fourteenth Amendment, of all things, in order to permit discrimination against any group, much less innocent children.

Demanding that certain children be treated differently from other children solely because of the actions or status of their parents conflicts with our notion of equality. It also conflicts with the general sentiment that legal burdens should bear some relationship to individual responsibility or wrongdoing.

Finally, prohibiting the children of illegal immigrants from becoming citizens will not solve the problem of illegal immigration. If the problem is that people are entering our country illegally, let us work harder to stop illegal immigration. But as long as there is a fundamental disparity between the United States and countries with historically poor job markets, repealing the Fourteenth Amendment is likely to have little or no effect on immigration, but it will leave indelible scars on our national psyche.

Mr. WATT. I would like to engage just briefly in response to Mr. Bono's question of whether this is convenient or a practical problem. I think we are in this area talking about constitutional rights. I want to make sure he understands the difference between worrying about practicality as opposed to constitutionality.

As a practical matter, it is very inconvenient for us to have the first amendment in this country, but it is a constitutional requirement. As a practical matter, it is very inconvenient for us to keep people out, of police officers from just engaging in Gestapo measures to go into people's houses and engage in illegal searches and seizures, but there is a constitutional principle at stake. Our Constitution can be inconvenient. To the extent that you are using this kind of practical shield to be synonymous with convenience or the convenience of the majority, which is what I think we're engaged in primarily here, primarily the white majority I would submit to you, I think we are engaging in a very, very dangerous thing.

Mr. BONO. Can I respond?

Mr. WATT. I just want to caution you about this practical approach to everything. I have some rights here, whether it is con-

venient or practical to you or not. I am not going to sit quietly by, although I'm not going to ask any questions, and have you trample on those rights just for your convenience, and just because you think it's practical.

I yield back the balance of my time.

Mr. BONO. Would the gentleman yield?

Mr. SMITH. The gentleman is yielded back the remainder of his time. The Chair, if Mr. Watt does not object, would yield the gentleman one minute.

Mr. WATT. I didn't realize he was trying to get me to yield. I'm happy to provide it.

Mr. BONO. Thank you. I certainly don't mean to trample on constitutional rights. If that's the impression that I gave you or anyone else in this room, I'm sorry. I'm just saying that throughout time, situations change. If they are constitutionally accounted for, that if they don't fit into today's society, I understand we have amendments to the Constitution. So I presume that is why we do have amendments to the Constitution, to take care of these situations that arise through time.

As far as the practical portion of what you are talking about, what I find amazing is that if you look at sports, none of these issues ever arise. I know sports is a specific area. But if you broaden it up and look at it, they have rules. Those rules apply.

Mr. WATT. Let me reclaim my time just long enough to tell you about my analysis of sports, Mr. Bono.

Mr. BONO. Whoever scores, they all hug them.

Mr. WATT. Can I reclaim my time, Mr. Chairman?

Mr. SMITH. Mr. Watt is recognized.

Mr. WATT. Let me tell you why I think we don't have these practical problems in the area of sports, because we've got some real statistical measurements. We had these problems in sports before black folks were even allowed to participate in professional sports. We finally got past them because we got some real logical criteria other than race now to measure people by. I mean, we know how many damn rebounds people get. We know how many points they average and score. We know how many errors they make or turnovers they make on the basketball court. We select people based on some specific criteria, rather than just your looking at them and saying look, I don't like the way this person looks.

Mr. BONO. Would the gentleman——

Mr. WATT. No. I won't yield. I'm tired of people talking to me about sports, as if it solves all the problems of America. That does not solve the problem of America. This is a diverse Nation. We have got different looking people. We can't always measure their ability to contribute to our nation based on whether they can shoot a damn free throw or not.

Mr. SMITH. Thank you, Mr. Watt. The Chair would like to indulge Mrs. Mink before we go vote.

Mrs. MINK of Hawaii. Thank you very much, Mr. Chairman. I regret that I have not been permitted an opportunity to present my entire testimony, so I ask that it be inserted in the record at this point.

Mr. SMITH. Without objection, so ordered.

[The prepared statement of Mrs. Mink follows:]

PREPARED STATEMENT OF HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mr. Chairman, as Chair of the Congressional Asian Pacific Caucus, I must protest that the Caucus was not welcome to testify before the Subcommittee regarding proposals to eliminate birthright citizenship. I vigorously dispute the view of the Subcommittee that the Caucus' perspective is not necessary to the debate into nationality and citizenship.

It is true that Hispanic aliens would be heavily impacted by removing birthright citizenship. However, it is a misconception that simply because so many Hispanic aliens would be affected that Asians need not be heard when citizenship restrictions are discussed.

Asians, more than any single racial group, have suffered from the U.S. discriminatory immigration policies. Asians were the first targets of immigration restrictions with the Chinese Exclusion Act of 1882 (which was not repealed until 1943). Asian entry was further restricted by the Immigration Act of 1917, which set up the Asiatic Barred Zone. Perpetuating the vital total exclusion of Asians was the Quota Act of 1921, which froze the ratio of immigrants to match the ethnic ratios already in place as of 1920—obviously, since virtually no Asians had been allowed to enter before, there were few slots allotted to Asians under the 1921 quotas.

It was not until after enactment of the Immigration and Nationality Amendments of 1965 that Asians were allowed into the United States in significant numbers. A large proportion of these immigrants were Indochinese refugees, particularly after the fall of Vietnam and Cambodia in 1975. Yet, of the 55 million people on record as having immigrated to the United States between 1820 and 1989, the vast majority—37 million—were European, 12 million came from the Americas, and only 5.7 million came from Asia. Given this very unbalanced history, I believe it is not entirely coincidental that furor over immigration has erupted, at the very time in our history that Asians and Hispanics are immigrating to the U.S. in larger numbers.

That said, I believe that all Americans—whether U.S. born or not—should be extremely wary of the Constitutional amendments being considered today to restrict birthright citizenship. Throughout American history, every Constitutional amendment that the states ratified was framed to increase individual freedoms. The only exception to this rule was the Amendment establishing Prohibition, which was soon repealed. This Constitutional history compels us to very rigorously investigate any proposal to restrict Constitutional liberties. I am quite puzzled that the party which proclaims it is trying to reduce governmental intrusion would seek a Constitutional amendment to restrict our freedoms.

These proposals to end birthright citizenship are so openly discriminatory as to expose the underlying motives of the anti-immigrant movement. The very idea that innocent children would be so harshly punished for the circumstances of their parents proves that the anti-immigrant movement is actually afraid that immigration is changing America's racial and cultural complexion. I challenge the sponsors to be honest as to their intentions. If they want illegal aliens to leave, then they should see to it that existing laws providing for deportation of illegal aliens are enforced properly. But if they want to take the drastic step of denying citizenship rights to innocent children born within our borders, I can only conclude that they want to protect not only our borders, but our racial make-up as well.

Most agree that a key factor that draws illegal immigrants to this country is the chance to get a job, to support themselves. This has been the case, whether immigrants came from Asia, the Americas or Europe. There is no empirical evidence to show that undocumented immigrants are coming to the U.S. specifically to obtain public benefits. In fact, illegal aliens are already barred from participating in most federal benefit programs in the first place. Furthermore, the proportion of illegal immigrants "caught" receiving benefits is very low, compared to the overwhelming amount who contribute to our economy by working—often taking jobs that no Americans will.

What will happen to a child of an illegal alien under this bill? If not considered a citizen, this child could wind up stateless, if she is not considered a national of the country of her parents' citizenship. Taking away birthright citizenship will thus be horribly divisive to this country. Let us be realistic: children born in the U.S. are not going to leave. But depriving them of citizenship does separate them from the rest of society, if does make them outcasts, it does deprive them of goods and services, it does increase the risk that they will turn to criminal activity and thereby become a burden upon the state, warehoused in our jails. This is hardly a recipe for unifying America.

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STATEMENT OF HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mrs. MINK of Hawaii. I appreciate this opportunity to participate in this hearing. Asians, more than any single group in this country, have suffered under discriminatory policies. I do not need to take the time of this committee to reiterate the Exclusion Acts, the categorization of Asian people who came to this country as ineligible aliens, who couldn't even become citizens by law until recent times; the complete closure of immigration potential to Asians until the 1965 act. So we have a right to be in this room when you are talking about immigration policies because no other segment of this country was more severely affected by the negative attitudes toward people who did not look like the rest of America. That is why I am here today, asking that you consider history before you amend the Constitution.

The Constitution's amendments that are current here today have always enlarged the rights for citizens in this country, for people who lived here. It has never been the policy of this great Nation to take away something. Nothing is more precious in this country than our birthright. We have talked about our birthright. Suddenly, this bill or constitutional amendment, suggests that we in this country have come to a point where we can no longer tolerate these babies to become citizens and define birthright by some other definition. I find this to be a very grave departure from the fundamental beliefs and freedoms of democracy.

So I urge this committee to expand the panelists to allow members of the Asian Pacific community to come in and testify, and to express their agonies about what they have endured. The internment in World War II was reprehensible. This Congress had to remediate that by reparations. Let's not begin a new venture here that takes away something that has been so precious, so inalienable as the birthright citizenship principle that has been so cardinal to our whole democracy.

So I thank the chairman for giving me time.

Mr. SMITH. Thank you, Mrs. Mink. The subcommittee will recess for 15 minutes.

[Recess.]

Mr. SMITH. The subcommittee will reconvene. We will go to our next panel, which consists of the Honorable Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice.

Mr. Dellinger, welcome. Thank you for your patience, which I'll also thank the subsequent panelists for as well when their turn comes up. If you would give us your testimony and try to limit it to 5 minutes. Thank you again for being here.

STATEMENT OF WALTER DELLINGER, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. DELLINGER. Chairman Smith, thank you, Chairman Canady. I appreciate being able to testify on behalf of the Department of Justice. I had planned to discuss with you, assuming that my whole statement would be in the record, principally the question of whether it would be advisable to amend the Constitution, because

I thought it so clear that the statutory alternatives would be unconstitutional. In light of the discussion this morning, I thought it might be appropriate for me to spend just a minute or two on why I think that is so clear.

The Office of Legal Counsel deals with a number of exceedingly difficult legal issues that keep us awake at night wrestling to what we hope is a correct conclusion. This is not one of those issues. I believe that the proposed statutory provisions are plainly unconstitutional.

The text of the 14th amendment is as clear as text can be on these matters. All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States. The question whether someone who is born here is subject to the jurisdiction is not a difficult one. The Framers of the 14th amendment clearly intended to have a very broad, very bright line, very objective rule. A rule which stated the fundamental principle that all who are born here are citizens, with the exceptions that are as old as the rule itself, of those who are in fact representatives of a foreign government as diplomats or the writer's exception of an occupying army, an exception that we saw in the case of *McKay* v. *Campbell*, where there is no clear sovereign on Oregon with British troops involved. With those exceptions, the baseline principle was the one which the Constitution adopted.

Wong Kim Ark was a person whose parents being born in China were under the Chinese Exclusion Acts forever barred from becoming citizens of the United States. So naturally enough, given the fervor in the country at the turn of the century, the challenge was made to whether Wong Kim Ark, born on the soil of the United States could be a citizen if those who gave him birth themselves were not and could never be citizens. The court took this issue on in the *United States* v. *Wong Kim Ark*. It fully addressed the issues. While it is true that his parents were not illegal aliens, the court's opinion in *Wong Kim Ark*, which is 50 pages of the majority opinion alone, so thoroughly canvases and deals with the question of whether persons born in this country and subject to its jurisdiction, under its laws, required to obey them, are citizens, and resolves that issue so forcefully in an opinion which has by no means become an object of antiquity, but rather, has been cited and relied upon for a proposition that's been adopted, and opinions of Attorney Generals of the United States. In the Supreme Court, it has been the assumption of the Court that this is the rule.

I take it that there is no doubt that the courts would decline to overrule the central proposition of *Wong Kim Ark*. And that therefore, if this change were to be made, it would have to be made by constitutional amendment.

Congress is of course free to propose and the States to ratify amendments to the Constitution. You have that power. When you undertake to exercise it, however, I would urge you to do so with caution and restraint. The more frequently that we amend the Constitution, and there are a variety of proposals, the less the Constitution becomes a foundational document, a bedrock, something that provides a security that we know what the fundamental, most basic rules are.

This particular proposition that would be amended by these proposals is one of those bedrocks. I simply want to ask you to consider before amending the opening sentence of the 14th amendment how it came to be part of our basic constitutional charter. It is quite striking to me, as someone who has taught constitutional history, to see in H.J. Res. 56 the statement, "The first sentence of section 1 of the 14th article to the Constitution of the United States is hereby repealed." I think it is important that you understand how fundamental the first sentence of section 1 of the 14th amendment is. That it was intended to deal with this very issue of establishing the fundamental right of citizenship to those born in America and subject to its jurisdiction. It arose in the aftermath of the *Dred Scott* decision, where the court made its first huge exception to the rule that those born here of free persons are citizens.

People often misremember *Dred Scott*, and believe it as a case about whether the offspring of slaves or whether slaves could be citizens. It is much more profound than that. What *Dred Scott* holds is that a free person, which Dred Scott alleged himself to be, a free person may not ever become a citizen of the United States if he is descended from persons of African descent. They were ruled out. That decision was part of a regime, part of a process that played a critical role in the formation of one of America's great political parties. The decision in *Dred Scott* led the new Republican Party's candidate for the Senate in Illinois to take on that proposition as one of the central parts of the dynasty that he would oppose. That if you could say that persons born in America are excluded from being citizens on that very fact, if you leave this to judges and politicians and no longer have it be a fundamental assumption, and if you couple with that, the extension of slavery into the territories, you have created a dynasty which he declared his new party to be dedicated to resisting. He said in Springfield, IL, in 1858, "To meet and overthrow the power of that dynasty is the work now before all those who would prevent that consummation."

In the aftermath of our tragic experience with our national plunge into the heart of darkness of the Civil War, it is not surprising that we came out of that war with a Congress intent on proposing to the nation that it be made a fundamental part of our charter that all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States.

This takes away discretion about the basic issue of birthright citizenship. It means that there should be no inquiry into whether or not one came from the right cast or race or lineage or blood line in establishing American citizenship. If you were born here, we care not the lineage of your parents.

Mr. Chairman, I see that my time is up. I will conclude and answer your questions by simply stating that while other countries and other theories might ascribe other kinds of citizenship, based on mutual consent or some other theories of the continental writers, in this country, because of our tragic history, we have found it profoundly important to establish citizenship by the simple fact of birth in America, an easily provable fact when anyone's citizenship is challenged. By that simple fact, you become a citizen of the United States. We have turned away from the notion that we should create any other categories.

Before we amend this fundamental charter in a way that would so change the basic presupposition of who becomes an American citizen, I would urge you to exercise exceeding caution and restraint. Thank you.

[The prepared statement of Mr. Dellinger follows:]

PREPARED STATEMENT OF WALTER DELLINGER, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Chairman Smith, Chairman Canady, and Members of the Subcommittees: Throughout this country's history, the fundamental legal principle governing citizenship has been that birth within the territorial limits of the United States confers United States citizenship. The Constitution itself rests on this principle of the common law.[1] As Justice Noah Swayne wrote in one of the first judicial decisions interpreting the Civil Rights Act of 1866,[2] the word "'Citizens' under our constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress. We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States."[3] When Justice Swayne wrote these words, the nation was only beginning to recover from a great Civil War sparked in no small part by the Supreme Court's tragically misguided decision in the *Dred Scott* case.[4] That decision sought to modify the founders' rule of citizenship by denying American citizenship to a class of persons born within the United States. In response to *Dred Scott* and to the Civil War, Congress enacted the 1866 Act, and Congress and the States adopted the Fourteenth Amendment in order to place the right to citizenship based on birth within the jurisdiction of the United States beyond question. Any restriction on that right contradicts both Fourteenth Amendment and the underlying principle that the amendment safeguards.

The several bills and resolutions now before Congress that would deny citizenship to children born in the United States to certain classes of alien parents raise various issues of law and policy. My testimony today will address two points constitutional law. First, because the rule of citizenship acquired by birth within the United States is the law of the Constitution, it cannot be changed through legislation, but only by amending the Constitution. A bill such as H.R. 1363, the "Citizenship Reform Act of 1995," that purports to deny citizenship by birth to persons born within the jurisdiction of this country is unconstitutional on its face. Second, the proposed constitutional amendments on this topic conflict with basic constitutional principles. To adopt such an amendment would not be technically unlawful, but it would flatly contradict our constitutional history and our constitutional traditions. Affirming the citizenship of African Americans that *Dred Scott* had denied, in 1862 President Lincoln's Attorney General wrote an opinion for the Secretary of the Treasury asserting "[a]s far as I know. . . you and I have no better title to the citizenship which we enjoy than the 'accident of birth'—the fact that we happened to be born in the United States."[5] Today, in 1995, we cannot and should try to solve the difficult problems illegal immigration poses by denying citizenship to persons whose claim to be recognized as Americans rests on the same constitutional footing as that of any natural-born citizen. Members of both of your Subcommittees have worked vigorously, with the Department of Justice on an even handed bipartisan basis, on legislation and oversight to address these problems.

I.

H.R. 1363, the "Citizenship Reform Act of 1995," exemplifies the various legislative proposals before the committees. The stated purpose of the bill is "to deny automatic citizenship at birth to children born in the United States to parents who are not citizens or permanent resident aliens." Section 3(a) of the bill amends section 301(a) of the Immigration and Nationally Act, which grants U.S. citizenship "at birth" to all persons "born in the United States, and subject to the jurisdiction thereof." Specifically, section 3(a) proposes to define the phrase "subject to the juris-

[1] Indeed, the common law's inclusive rule of citizenship by birth defined "the People" who created the Constitution. "The Constitution itself does not make the citizens; it is in fact made by them. It only . . . recognizes such of them as are natural—home born." Citizenship, 10 Op. Att'y Gen. 382, 389 (1862).

[2] Act of April 9, 1866, ch. 331, § 1, 14 Stat. 27.

[3] *United States* v. *Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16, 151) (Swayne, J., on circuit).

[4] *Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1857).

[5] 10 Op. Att'y Gen. at 394.

diction thereof" to include only children born to U.S. citizens or permanent resident aliens.

My office grapples with many difficult and close issues of constitutional law. The lawfulness of this bill is not among them. This legislation is unquestionably unconstitutional. The Fourteenth Amendment declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The unmistakable purpose of this provision was to constitutionalize the existing Anglo-American common law rule of *jus soli* or citizenship by place of birth and especially to extend it to persons of African descent and their descendants.

The phrase "subject to the jurisdiction thereof" was meant to reflect the existing common law exception for discrete sets of persons who were deemed subject to a foreign sovereign and immune from U.S. laws, principally children born in the United States of foreign diplomats, with the single additional exception of children of members of Indian tribes. Apart from these extremely limited exceptions, there can be no question that children born in the United States of aliens are subject to the full jurisdiction of the United States. And, as consistently recognized by courts and Attorneys General for over a ce..... most notably by the Supreme Court in *United States* v. *Wong Kim Ark*,[6] there is no question that they possess constitutional citizenship under the Fourteenth Amendment.

A. While the Constitution recognized citizens of the United States in prescribing the qualifications for President, Senators, and Representatives, it contained no definition of citizenship until the adoption of the Fourteenth Amendment in 1868. Prior to that time, citizenship by birth was regulated by common law. And the common law conferred citizenship upon all persons[7] within the territory of the United States, whether children of citizens or aliens.[8] The only common law exceptions to this generally applicable rule of *jus soli* were children born under three circumstances—to foreign diplomats, on foreign ships, and to hostile occupying forces—which, under principles of international law, were deemed not be be within the sovereignty of the territory.[9]

As the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment makes clear, the definitions of citizenship contained in both were intended to codify the common law and overrule *Dred Scott's* denial of citizenship to persons of African descent. Thus, with the three limited exceptions already noted and the additional exception of tribal Indians, the Fourteenth Amendment guaran-

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[6] 169 U.S. 649 (1898).

[7] Slaves, shamefully, not being considered persons at all for many legal purposes, were ignored by the common law analysis.

[8] E.g., *Murray* v. *the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 119 (1804) (presuming that all persons born in the United States were citizens thereof), *McCreery* v. *Somerville*, 22 U.S.C (9 Wheat.) 354 (1824) (in determining title to land in Maryland, court assumed that children born in the state of an alien were native-born citizens of the United States); *Lynch* v. *Clarke*, 1 Sandf. Ch. 583 (N.Y. 1844) (in holding that child born in New York during temporary stay by alien parents was a citizen of United States, Court, after thorough examination of law, concluded that it entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen); Letter from Mr. March, Secretary of State to Mr. Mason, United States Minister to France (1854) 2 Francis Wharton, "Digest of the International Law of the United States" 394 (2d ed. 1887) ("In reply to the inquiry which is made by you, . . . whether 'the children of foreign parents born in the United States, but brought to the country in which the father is a subject, and continuing to reside within the jurisdiction of their father's country, are entitled to protection as citizens of the United States,' I have to observe that it is presumed that, according to the common law, any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship."); 10 Op. Att'y Gen. 328 (1862) (child born in the United States of alien parents who have never been naturalized is, by fact of birth, a native-born citizen of the United States); 10 Op. Att'y Gen. 382 (1862) (reaffirming general principle of citizenship by birth in the United States and rejecting the existence under law of a class of persons intermediate between citizens and aliens); Frederick Van Dyne, "Citizenship of the United States" 6–7 (1904) ("It is beyond doubt that, before the enactment of the civil rights act of 1866 . . . or the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States." (citation omitted)).

[9] *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898); 4 Charles Gordon et al., "Immigration Law and Procedure" §92.03[3] (rev. ed. 1995). See footnote 12 for a discussion of the status of tribal Indians.

The principal alternative system, *jus sanguinis*, used in most civil law European countries, grants citizens by descent or blood—that is, according to the citizenship of one's parents. This system obviously could not have operated in the United States at its inception, where, except for American Indians, the inhabitants were citizens of other countries.

teed citizenship to all persons born in the United States, including children born to aliens.

The Civil Rights Act of 1866 provides that "[A]ll persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." During the debates on the Act, the Chair of the House Judiciary Committee stated that the provision defining citizenship is "merely declaratory of what the law now is," and he cited, among other authorities, a quotation from William Rawle, whose constitutional law treatise was one of the most widely respected antebellum works: "Every person born within the United States, its Territories or districts, whether the parents are citizens or aliens, is a natural-born citizen in the sense of the Constitution, and entitled to all the rights and privileges appertaining to that capacity."[10]

The Fourteenth Amendment initially contained no definition of citizenship. Senator Howard of Michigan proposed to insert the definition that became the opening sentence of the Fourteenth Amendment:

"This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States."

He explained that this was not meant to include those discrete classes of persons excluded by the common law, "but will include every other class of persons."[11]

The Framers intended the amendment to resolve not only the status of African-Americans and their descendants, but members of other alien groups as well. This is reflected in the exchange between Senators Trumbell and Conness, supporters of the Fourteenth Amendment and the Civil Rights Act, and Senator Cowan, a strong opponent of both. Senator Cowan expressed his reluctance to amend the Constitution in such a way as would "tie the[] hands" of the Pacific states "so as to prevent them from [later] dealing with [the Chinese] as in their wisdom they see fit." The supporters of the citizenship clause responded by confirming their intent to constitutionalize the U.S. citizenship of children born in the United States to alien parents.[12]

"Senator Cowan. . . .I am really desirous to have a legal definition of 'citizenship of the United States.' What does it mean? . . . Is the child of the Chinese immigrant in California a citizen? Is the child of a gypsy born in Pennsylvania a citizen?

Senator Conness . . . . The proposition before us . . . relates . . . to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so.[13]

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[10] Cong. Globe, 39th Cong., 1st Sess. 1115 (1866); id at 1117 (quoting William Rawle, "A View of the Constitution of the United States of America" 80 (1829)).

[11] Cong. Globe, 39th Cong., 1st Sess. 2890 (1866)

[12] See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2891 (1866).

[13] See, e.g., Cong. Globe, 39th Cong., 1st Sess. at 2890–91.

A great deal of attention was spent on how (not whether) to exclude unassimilated or tribal Indians. Ultimately, any reference to "excluding Indians not taxed"—the phrase used in the Civil Rights Act of 1866—was omitted as unnecessary, as they were not deemed to be "subject to the jurisdiction" of the United States because of the unique status of Indian tribes within the United States. In *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884), the Court construed the "subject to jurisdiction" clause in a case brought by an Indian claiming citizenship who was born a member of a tribe, but who had later taken up residence among the non-Indian citizens of the state. The Court held he was not a United States citizen, because he was not "subject to the jurisdiction" of the United States at the time of his birth. In construing the phrase "subject to the jurisdiction" the Court noted that the Indian tribes, although not, strictly speaking, foreign nations, were alien nations with distinct political communities with which the United States entered into treaties.

"Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power) although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, or ambassadors of other public ministers of foreign nations."

Id. at 102. See also David C. Williams," The Borders of the Equal Protection Clause: Indians as Peoples," 38 UCLA L. Rev. 759, 832–41 (1991) (reviewing the legislative history of the citizenship clause to conclude that "subject to jurisdiction" was intended to exclude tribal Indians with separate laws and governments of their own, and thus were, "in modern international law parlance," a separate people") *Wilkins* cannot be interpreted to mean that children born in the United States of aliens are not "subject to the jurisdiction" of the United States because their par-

Continued

C. The Constitutional guarantee of citizenship to children born in the United States to alien parents has consistently been recognized by courts, including the Supreme Court, and Attorneys General for over a century. Most notably, in *United States* V. *Wong Kim Ark*[14] the Supreme Court held that a child born in San Francisco of Chinese parents (who, under the Chinese Exclusion laws then in effect, could never themselves become U.S. citizens) became at the time of his birth in the United States a citizen of the United States, by virtue of the Fourteenth Amendment.

The Court, in a detailed review of the Anglo-American common law of citizenship and the legislative history of the Fourteenth Amendment, established several propositions. First, because the Constitution does not define United States citizenship, it must be interpreted in light of the common law. Under the common law of England, which was adopted by the United States, every child born within the territory of alien parents was a natural-born subject, with the exception of children born of foreign ambassadors, of alien enemies during hostile occupation, and of aliens on a foreign vessel.

Further, "[a]s appears upon the face of the [Fourteenth] Amendment, as well as from the history of the times, [the amendment] was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect." Id. at 676. Specifically, the Court explained, "[t]he real object . . . in qualifying the words '[a]all persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law) the two classes of cases—childern born of alien enemies in hostile occupation, and childern of diplomatic representatives of a foreign State—both of which . . . by the law of England, and by our own law, . . . had been recognized exceptions to the fundamental rule of citizenship by birth within the country." Id. at 682.

"In concluding its review of the relevant law, the Court summarized: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of the children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."

The Court then turned to the status of Chinese persons in the United States under the Constitution and the Chinese Exclusion Acts, which provided for exclusion and expulsion of Chinese persons. After considering the effects of both sources of law, the Court held that Wong Kim Ark has become a citizen at birth by virtue of the Fourteenth Amendent, reaffirming the constitutional principle that "[t]he Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." Id. at 703.

The principles set forth in *Wong Kim Ark* cannot be dismissed as having been overtaken by contemporary judicial interpretation or current events. Both the courts and commentators have consistently cited and followed the principles of *Wong Kim Ark*[15]

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ents may owe some allegiance to their own country of birth. Otherwise, dual nationality would be prohibited.

The denial of citizenship to American Indians was later corrected by statute. 8 U.S.C. § 1401(B).

[14] 169 U.S. 649 (1898).

[15] See *Rogers* v. *Bellei*, 401 U.S. 815, 829-30 (1971) (citizenship clause is 'declaratory of existing rights, and affirmative of existing law,' so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned"); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159 n.10 (1963) (confirming that the citizenship clause" is to be interpreted in light of pre-existing common-law principles governing citizenship"); *Plyler* v. *Doe*, 457 U.S. 202, 211 n.10 (1982) (relying on *Wong Kim Ark*'s predomi-

I am aware of only one statement of the contrary view that birthright citizenship may be modified by a simple act of legislation. In their 1985 book, Professors Peter Schuck and Rogers Smith argue for a novel "reinterpretation" of the citizenship clause.[16] Briefly, the authors recommend replacing the "ascriptive" approach to citizenship—which determines citizenship by an objective circumstance, such as place of birth or citizenship of parents—with a "consensual" approach—which makes poltical membership a product of mutual consent by the polity and the individual. The authors argue that the Fourteenth Amendment may be reinterpreted to allow Congress to deny citizenship to children of illegal aliens by legislation (as opposed to constitutional amendment). As support, the authors attempt to show that the Framers of the Fourteenth Amendment intended the reference to "subject to the jurisdiction" of the United States to replace the existing ascriptive common law principle with one of express mutual consent. As one reviewer recommends, the authors' proposals "should be relegated to academic debate."[17]

Schuck and Smith are proposing a change in the law, not a plausible reinterpretation of the Constitution. Their theory would require repudiation of the language of the Constitution itself, the clear statements of the Framers' intent, and the universal understanding of 19th and 20th century courts. Indeed, the authors themselves concede that there is no judicial precedent in support of their theory. Moreover, as one review of the book notes on a more philosophical level, "[t]he examples [Schuck and Smith give in support of their consent theory]—the denial of citizenship to Blacks, Indians and Chinese—are all deeply shameful for contemporary Americans. This is not a history to build on."[18]

In short, the text and legislative history of the citizenship clause as well as consistent judicial interpretation make clear that the amendment's purpose was to remove the right of citizenship by birth from transitory political pressures. The Supreme Court noted in *Wong Kim Ark*,[19] "[t]he same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution." More recently, the Supreme Court noted in *Afroyim* v. *Rusk*[20] that the framers of the Fourteenth Amendment "wanted to put citizenship beyond the power of any governmental unit to destroy." See also *Rogers* v. *Bellei*, 401 U.S. at 835 (recognizing that "Congress has no 'power, express or implied, to take away an American citizen's citizenship without his assent,'" where that citizenship is attained by birth). By excluding certain categories of native-born persons from U.S. citizenship, the proposed legislation impermissibly rescinds citizenship rights that are guaranteed to those persons by the citizenship clause of the Fourteenth Amendment. Such a rescission of constitutionally protected rights is beyond Congress' authority.

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nantly geographic interpretation of the "jurisdiction" clause of the Fourtheenth Amendment); *INS* v. *Rios-Pineda*, 471 U.S. 444, 446 (1985) (in habeas proceeding brought by deportable aliens, Court noted that respondent had given birth to a child, "who, born in the United States, was a citizen of this country"); *Mc[illegible]* v. *California*, 291 U.S. 83, 85 (1933) (noting that although persons of Japanese descent were not eligible to become citizens through naturalization, a person of Japanese descent is a citizen of the United States if he was born within the United States, citing *Wong Kim Ark*); 4 Charles Gordon et al., "Immigration Law and Procedure" § 92.03[2][e] (rev. ed. 1995) (noting that any uncertainty regarding the applicability of the *jus soli* rule to children born in this country was "finally resolved by the Fourteenth Amendment and the Supreme Court's decision in *U.S.* v. *Wong Kim Ark*. There is now no doubt that the constitutional rule of universal citizenship for all persons born in the United States is unaffected by the status of their parents, except in minimal situations. Thus American citizenship is acquired by children born in the United States, even though their parents were always aliens, and even if the parents were themselves ineligible to become citizens of the United States. Nor has the acquisition of citizenship been affected by the circumstance that the child's alien parents were in the United States temporarily or even illegally at the time the child was born." (footnotes omitted)).

[16] Peter H. Schuck & Rogers M. Smith, "Citizenship Without Consent: Illegal Aliens in the American Polity" (1985).

[17] Arthur C. Helton, "*Citizenship Without Consent*" 19 Int'l L. & Politics 221, 226 (1986) (book review). For incisive critiques of Schuck and Smith's work, see also, David A. Martin "Membership Without Consent: Abstract or Organic?," 11 Yale J. of Int'l Law 278 (1985) (book review); Gerald L. Newman, "Back to Dred Scott," 24 San Diego L. Rev. 485 (1987) (book review).

[18] David Howarth, "Citizenship Without Consent," 46 Cambridge L.J. 169, 170 (1987) (book review).

[19] 169 U.S. at 675.

[20] 387 U.S. 253, 263 (1967).

II.

Congress is, of course, constitutionally free to propose, and the states to ratify, any amendment to the Constitution.[21] Such naked power undeniably exists. The Constitution taken as a whole, however, stands for certain enduring principles.[22] When Congress undertakes to tamper through the amendment process with the most basic presuppositions of American constitutionalism, it should do so with exceeding caution and utmost restraint. The proposition that all persons born in the United States and subject to its jurisdiction are citizens at birth is one of those bedrock principles.

Academics may conceive of nation-states in which citizenship would not necessarily extend to those who lack the approval or mutual consent of existing citizens. But the country in question is not some theoretical conception, but our own country with its real experience and its real history. It would be a grave mistake to alter the opening sentence of the Fourteenth Amendment without sober reflection on how it came to be part of our basic constitutional charter.

The constitutional principal with which these proposed amendments would tamper flows from some of the deepest wellsprings of American history. From the earliest days of our nation, with the tragic exception of slaves and tribal Indians, all those who were born on its soil and subject to no foreign power became its citizens. The simple fact of birth here in America was what mattered.

And then came *Dred Scott*. In its most monumentally erroneous decision, the Supreme Court created a monstrous exception to the common law rule that birth on American soil to a free person was sufficient for American citizenship. The Court held that no persons of African descent—including free persons of African descent—and none of their descendants for all time to come could ever be citizens of the United States regardless of their birth in America.

It was in the aftermath of this decision that one of our great political parties was formed. In 1857, in the first of many speeches he was to give on the subject, that party's candidate for President in 1860 denounced *Dred Scott's* creation of a class of persons born on American soil and yet without rights and condemned to pass their status on to future generations. Abraham Lincoln declared that the defenders of that decision had committed themselves to a principle that contradicted—and that made a "mere wreck, a mangled ruin"—of the Declaration of Independence.[23]

Afterwards, the nation plunged into the heart of darkness—a savage and brutal civil war in which hundreds of thousands lost their lives on the battlefield. From those ashes, a nation was reformed. It is no trivial matter that the Fourteenth Amendment opens with the principle that some would now change. From our experience with *Dred Scott*, we had learned that our country should never again trust to judges or politicians the power to deprive from a class born on our soil the right of citizenship. We believe that no discretion should be exercised by public officials on this question—there should be no inquiry into whether or not one came from the right caste, or race, or lineage, or bloodline in establishing American citizenship. Other nations may seek more consensual and perhaps more changeable forms of citizenship; for us, for our nation, the simple, objective, bright-line fact of birth on American soil is fundamental.

Since the Civil War, America has thrived as a republic of free and equal citizens. This would no longer be true if we were to amend our Constitution in a way that would create a permanent caste of aliens, generation after generation after generation born in America but never to be among its citizens. To have citizenship in one's own right, by birth upon this soil, is fundamental to our liberty as we understand it. In America, a country that rejected monarchy, each person is born equal, with no curse of infirmity, and with no exalted status, arising from the circumstance of his or her parentage. All who have the fortune to be born in this land inherit the right, save by their own renunciation of it, to its freedoms and protections. Congress has the power to propose an amendment changing these basic principles. But it should hesitate long before so fundamentally altering our republic.

Mr. SMITH. Thank you, Mr. Dellinger. A couple of questions for you. First of all, I assume that your position is the Department of Justice's position. Is that correct?

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[21] The only present exception to this rule is the proviso to Article V of the Constitution that "no State, without its consent, shall be deprived of its equal Suffrage in the Senate."

[22] See Walter Dellinger, "Constitutional Politics: A Rejoinder," 97 Harv. L. Rev. 446, 447, (1983).

[23] Speech at Springfield, Illinois (June 26, 1857), in 2 "The Collected Works of Abraham Lincoln" 406 (Roy P. Basler, ed. 1953).

Mr. DELLINGER. That is correct. I am here to testify on behalf of the Department of Justice.

Mr. SMITH. Just briefly, do you feel that all illegal aliens should be deported?

Mr. DELLINGER. Mr. Chairman, that is not my area of responsibility. I know that the Department has worked with your committee and has found that to be a very good working relationship, and that the Department has undertaken a 40-percent increase in Border Patrol and a major increase in deportation.

Mr. SMITH. I know. But my question is, do you favor the deportation of illegal aliens.

Mr. DELLINGER. Yes. I believe that is our law. I do favor it and the Department favors it. I believe that we have fairly dramatically increased the number of deportations.

Mr. SMITH. I am aware of that, as well. Let me go to the legislative history and ask you a couple questions there, because when I read these words, I read into them a meaning that I think other people do, but I would like to get your opinion on them as well. This is awfully small print. This goes back to the original debate in 1866 in Congress between the two Senators who were the primary proponents of the 14th amendment. If I can read it here, tell me why this sentence wouldn't apply to illegal aliens today. They talk about the amendment and say, "This will not of course include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."

If that is a part of the original legislative history of the amendment, doesn't that exclude individuals, even though they didn't intend it at the time, wouldn't that encompass illegal aliens today?

Mr. DELLINGER. I would not so read it. You have to recall that this was an oral statement transcribed by a transcriber, who is inserting the commas. The plain sense of that passage is foreigners, aliens who are not subject to the jurisdiction of the United States are the ones who are excluded. It's not a freestanding exclusion of aliens.

Mr. SMITH. Let's just say I think that that's open to interpretation. I can understand why people would read the plain meaning of the words aliens and foreigners to include people today who would not—who would be the children of illegal aliens.

As far as the Court case history goes, I just have to tell you, maybe we disagree on this a little bit. Both in the Ark case and the in *Dred Scott* case, there was never the issue of children of illegal aliens. As you pointed out in the *Ark* case, the parents were legal immigrants. In the *Dred Scott* situation, I think that was entirely different. To my knowledge, there is not a Supreme Court case directly going to the issue of children of illegal aliens. Would you agree with that or not?

Mr. DELLINGER. I would agree with that if you understand that that is a highly technical construct in light of the fact that the Court first in *Wong Kim Ark* clearly addresses and deals at extraordinary length with the very pointed issue of whether everyone who is born here is not subject to a foreign power as a diplomat is a citizen. Secondly, that the Court in later cases such as *Plyler*

v. *Doe* assumes that *Wong Kim Ark* is the law of the land, treats it as such, and does so as an assumption.

Mr. SMITH. That is true, but as you know, the Supreme Court likes to narrowly define issues and make them as narrow as possible. It just seems to me that it's a stretch for us to say that either of those cases address the direct issue of the children of illegal aliens. I know in the case of the *Plyler* decision, for instance, the only reference was in dictum in a footnote. That's about as close as they got. So I don't think any case is directly on target.

One more quick question. Do you feel that the children of illegal aliens born in the United States today pose any kind of a problem to taxpayers? We're going to hear testimony a little bit later on that the cost of the children of illegal aliens just in Los Angeles County is over a billion dollars, when you include welfare and education. There's other testimony that 16 percent of the births in all of California now are to the children of illegal aliens. The appearance there, let me say, is that law breakers are being rewarded, taxpayers are being cheated, and citizenship is being cheapened. You may or may not feel that that justifies changing the 14th amendment. But my question is, do you think that that's a problem in our society today?

Mr. DELLINGER. Well, I certainly do think that, and the Department's assumption and its work with this committee is based on the assumption that illegal immigration is a problem. Our response to this proposal is not simply or not only that it is unwise to amend such a fundamental provision of the Constitution, but that that deals with the problem at the margin.

Mr. SMITH. My time is up. I heard your answer to say it's a problem. Then you went to the Department's view that we ought not amend the Constitution. I understand that answer.

We'll go to Mr. Becerra for 5 minutes.

Mr. BECERRA. Thank you, Mr. Chairman. Thank you, Mr. Dellinger, for your testimony and that of the Department of Justice. Can you tell me what, and I'm asking you as a representative of the Department of Justice, what the position of the department is with regard to the definition of that word, subject to the jurisdiction of?

Mr. DELLINGER. I think that this is a very easy matter. We have as few cases as we do on this point simply because it has gone without saying. That all those who are born in the United States and who are under its laws and obligated to obey them are citizens by the clear text of the 14th amendment. That those who are, as you know, diplomats and their families are exempted from having to obey many of the laws. They simply have what we call diplomatic immunity. Obviously if an army were to occupy the Northwest United States, we would no longer be in control. But it means something very simple. Are you subject to the laws of the United States.

And about that, there is no doubt a child who is born in Chicago in the United States is subject to the jurisdiction of the United States, must obey its laws, can be regulated, controlled by the United States, can not invoke diplomatic immunity. It is as clear as can be. Anyone who went into court to argue that a child born in a hospital in Chicago, IL, who was living in Chicago and had to

obey the laws of the State of Illinois and of the United States and was fully subject to all its laws—anyone who would argue that that person was not a citizen under the 14th amendment would have to run first of all head long into the clear text, but then into the presupposition of all of our cases in both the 19th and 20th centuries and the conclusions of attorney generals.

So I think the chance that the Court would overturn that is as close to a nullity as any proposition I have heard discussed seriously in Congress.

Mr. BECERRA. Let me make sure I am clear on something. Say an individual parks illegally here on the streets of Washington, DC. The car is issued a parking ticket. If it happens to belong to a diplomat, that diplomat is not subject to the jurisdiction of the D.C. courts and has no obligation to go to the court and pay that fine.

Mr. DELLINGER. That is correct. You will recall that my senior Senator from my home State, Senator Helms has proposed reducing the foreign aid of any country that hasn't paid its parking tickets because there's no other way to enforce the law since they are not subject to our jurisdiction.

Mr. BECERRA. That is a clear statement of what is interpreted to mean—what we interpret to mean subject to the jurisdiction. Diplomat and the diplomat's offspring are not obligated to appear before any court and actually obey any law in the United States now. They are subject to exclusion from this country for diplomatic purposes and through diplomatic channels. But in terms of a court wanting to gain jurisdiction over that person, the court can not do so.

Mr. DELLINGER. Right.

Mr. BECERRA. That doesn't happen to apply to anybody that is not a diplomat, as you said, who happens to be born in this country, whether they are born of parents who are U.S. citizens, legal residents or otherwise.

Mr. DELLINGER. I think my simplest answer to you would be that subject to the jurisdiction means under the laws and obligated to abide by the laws. A child whose parents are undocumented aliens from a foreign country are subject to the courts. If they are teenager and get into trouble, they can be prosecuted. If there are issues about child abuse or custody, those can be dealt with by the courts because they are under the jurisdiction in the most straight forward meaning of that term.

Mr. BECERRA. Now let me ask you as an attorney. If I recall correctly, there is a standard practice within the practice of law that words speak for themselves. So you don't need to look behind the meaning of a word if it's a plain word, it's used plainly, and it's very clear from the text what it says and what it means. As I understand the 14th amendment, it starts off by saying all persons born or naturalized in the United States.

Does there seem to be any ambiguity to you in what we mean by all persons born in the United States?

Mr. DELLINGER. No. I do not think that is ambiguous.

Mr. BECERRA. And even if you take a look—actually, it's an interesting point. I don't know if most folks look at it this way, but it is a fact that the 14th amendment was proposed to address the problem that we faced in this country with regard to the African-

Americans in this country and the *Dred Scott* decision. I think it is always forgotten that the African-American was an immigrant, a compelled immigrant unfortunately, but they were the first immigrants to this nation in a sense that were compelled. While we don't think of the African-American population as an immigrant population, they in fact did have to immigrate, against their will in many cases, to this country. It seems to me that we're talking about an amendment that applied for a particular purpose, but extended beyond that, and the record shows that, congressional history shows that. Yet if you take a close look at this population that was most the target of this protection, it was also an immigrant population I would say.

Mr. DELLINGER. The framers of the 14th amendment made the decision, even though a principle focus was the rights of newly freed slaves, not to so limit. The equal protection clause is not limited to equal protection of the laws for persons of color or the equal protection of persons who have been newly freed slaves. They decided to make general basic constitutional propositions. With respect to the opening sentence, rather than simply saying persons of African descent are citizens if they are born in the United States, which would have literally overturned the problem, they dealt more generally with the issue by once again reaffirming that this should not be a discretionary judgement. That it should be a bright line objective fact of birth here.

Mr. BECERRA. Thank you very much. Thank you, Mr. Chairman.

Mr. SMITH. The chairman of the Constitutional Law Committee has the time.

Mr. CANADY. Thank you, Mr. Chairman. I would like to begin by thanking you for your leadership on this issue and apologizing for my inconsistent attendance today. I apologize. I had two markups going on this morning.

I will also point out that I am not a cosponsor of any of these bills, and I'm not sure what the right approach is to dealing with the issue that has moved members to introduce the constitutional amendments and the statutory provisions. So I am listening with great interest to the testimony.

I appreciate the Department of Justice's viewpoint on this. Thank you, Mr. Dellinger, for being here to give us the benefit of your analysis of the issue.

Just one question I would like to ask you. Would you comment on the case of *Elk* v. *Wilkins*. It's referred to in your written testimony. I'd like to see if you believe that that case is consistent with the later case of *United States* v. *Wong Kim Ark* and the views you have stated today. Basically in your testimony you say that it is. But this is a case, as I understand it, in which the court dealt with the case of an American Indian claiming citizenship who was born a member of a tribe but who had later taken up residence among non-Indian citizens of the state in which the individual was located. The court determined that the Indian was not a citizen of the United States.

Mr. DELLINGER. You know, I do think it is not inconsistent with anything that we have said here today. It is part of our sometimes tragic history with respect to the relationship of this country to tribal Indians. But the 1884 notion about subject to the jurisdiction

arose in a context in which, as the court could say, even though they were in a geographical sense born in the United States, they were not subject to the jurisdiction thereof any more than the children who were subject to foreign governments born within the domain, that is, the children born of ambassadors. Because you know, we entered into treaties with what we saw as the tribes of the Indian nation. So we treated them as separate sovereignties with a separate jurisdiction, and that those cases are part of an exception which Congress has itself corrected under statute, making all persons born here who are American Indian citizens by statute.

Mr. CANADY. OK. I have no other questions. Thank you.

Mr. SMITH. The Chair will indulge Mr. Bilbray.

Mr. BILBRAY. Thank you, Mr. Chairman. The words, as pointed out quite clearly, anyone born in the United States, the children of diplomats, do they receive automatic citizenship under the 14th amendment?

Mr. DELLINGER. No. Because they are not subject to its jurisdiction.

Mr. BILBRAY. In other words, subject to its jurisdiction is a conditioning clause that bears as much authority as the segment that says——

Mr. DELLINGER. Right.

Mr. BILBRAY. OK. Do you feel that that segment is punitive against the children of diplomats?

Mr. DELLINGER. No. I do not.

Mr. BILBRAY. Children of an occupying or invading army, do they qualify for automatic citizenship under the 14th amendment?

Mr. DELLINGER. They do not.

Mr. BILBRAY. Do you feel that it is prejudiced or punitive that the 14th amendment has that condition?

Mr. DELLINGER. I do not.

Mr. BILBRAY. And you have already articulated that native Americans who were born under the tribal system in 1884 does not recognize the Supreme Court as receiving automatic citizenship at birth? Do you feel that——

Mr. DELLINGER. That is correct. That is correct.

Mr. BILBRAY. We can debate if that's punitive. OK. So I think we've got the context that there are conditions here that are not based on race, not based on prejudice, based on a common concept.

Let me throw something out. In this century, there was an occupation of a Mexico City—I mean a New Mexico town by forces under a man called Pancho Villa. In your definition of the 14th amendment, if a child was born in that town at the time that Pancho Villa occupied that town, would that child qualify for automatic citizenship?

Mr. DELLINGER. Not by virtue of being born while it was being occupied by hostile forces, if there's a true occupation. That would not be within the meaning of the amendment if the occupation were substantial enough and covered a broad enough area. If the United States is in control of the State itself, you could debate that. Of course Congress has by statute made the children of American citizens abroad our citizens. So there could be citizenship by parents. But if someone was born in an occupying army to someone

that came with that army, they are outside the jurisdiction in the same sense that diplomats are.

Mr. BILBRAY. Do you think that is a punitive issue against these people?

Mr. DELLINGER. No.

Mr. BILBRAY. OK. Now the definition that you work on, is that based solely on the 14th amendment reference to under the jurisdiction, or is that reference to under the jurisdiction a reference back to British common law based on the *Calvin* case?

Mr. DELLINGER. I think the 14th amendment stands on its own bottom. It is informed by the history in this country of a common law of birthright citizenship. It emerges out of our own experience. Under the jurisdiction thereof in that sense just means exactly what it says, under the effective jurisdiction of the United States.

Mr. BILBRAY. Are you in agreement with the prevailing side of the *Wong Kim Ark* case?

Mr. DELLINGER. I think the case was correctly decided, yes.

Mr. BILBRAY. Are you aware that in the *Wong Kim Ark* case the prevailing side specifically referred to the *Calvin* case, and specifically referred to British common law, and specifically referred to the conditions of the *Calvin* case that states quite clearly that—and this is where we get into that basic concept of diplomats—refers to those who are diplomats and the children would not qualify as children of a hostile occupation. In that definition, they also referred in parenthesis of those who—who are not in allegiance or in obedience to the sovereignty of the King.

Now as you refer to the *Wong Kim Ark* case, do you discount this segment of the ruling which was used as a justification for the existing rule?

Mr. DELLINGER. No. I do not. I do not discount it.

What I don't understand is how that has any effect on the concept of those who are subject to the jurisdiction of the United States. It is not a requirement—first of all, it is not a requirement of that that one obey all the laws to be subject to its jurisdiction. It is merely you are obligated to obey the laws. Secondly, the persons whose citizenship is in question here are not themselves at time of birth in disobedience of any laws.

Mr. BILBRAY. The definition comes down to sovereign and the right of sovereignty. That really—the invading army and the diplomats we do not agree will be in violation of the sovereign or the sovereignty issue. Thus, that's why they are not allowed to have the automatic citizenship.

Mr. DELLINGER. They may well be in opposition to the sovereignty. But that is not why they are excluded from the 14th amendment. They are excluded because they are not under the jurisdiction of the United States.

Mr. BILBRAY. OK, Mr. Chairman, I will just state that I think that the real technical issue here is that there is a violation of the national sovereignty that occurs. As my colleague may not be aware of, when we talk about being obligated to follow or being under the authority of the law, illegal aliens are not under the same obligation in a practical sense as a resident alien or a citizen. I will give you an example. Minor offenses do not constitute criminal incarceration. They reflect a deportation, to where a U.S. citi-

zen who breaks into the house next door to mine would go through the criminal process. The illegal alien who violates that law has the option to accept that he is not under the jurisdiction and can leave the country rather than having to fulfill the responsibility. Now these are something that a citizen, a U.S. citizen does not have the right to be up for.

Mr. SMITH. Thank you, Mr. Bilbray. Mr. Becerra.

Mr. BECERRA. Thank you. Are we going to have a chance to do our second round of questioning?

Mr. SMITH. We are not planning to do so. Do you have a question you would like to ask now?

Mr. BECERRA. Actually I'd like to engage the gentleman from California, Mr. Bilbray.

Mr. SMITH. The gentleman is recognized.

Mr. BECERRA. First let me say that the gentleman is incorrect. That individual, that undocumented immigrant is still subject to the jurisdiction of that local authority to be prosecuted for that petty offense. It just happens that there is an option provided to the immigrant to be deported. Therefore, the local government can avoid the cost of having to go through the trouble of prosecuting and incarcerating or fining the person. So the immigrant is not outside the jurisdiction of the entity. It just is that they are given an opportunity to be deported rather than stay.

But if I could ask the gentleman a question.

Mr. BILBRAY. If you'd yield just a moment on that point.

Mr. BECERRA. Sure.

Mr. BILBRAY. But do you see that unless there is a distinct difference and line drawn there legaliy, there is the issue of equal protection under the law, because the U.S. citizen is not given the same option. Unless there is a distinct line drawn between the jurisdictional lines between the resident alien citizen and an illegal alien.

Mr. BECERRA. I think most people would rather pay less than a thousand dollar fine than be deported from the country and lose all rights to be in this country whatsoever. But that brings me to a second point I'd like to try to engage the gentleman in conversation on.

The gentleman I guess rests his theory about this definition of subject to jurisdiction of the sovereignty on this language about allegiance and obedience to a sovereign. May I ask the gentleman a couple of questions. Someone who burns an American flag is certainly in many cases and perhaps we'll soon determine with a vote in the Congress and through the States that it will be a violation of law to burn the American flag, to desecrate it. Would that be a showing of nonallegiance and disobedience that would require that person to lose citizenship?

Mr. BILBRAY. The reference to nonobedience and disobedience is a reference to the sovereignty of the King.

Mr. BECERRA. Isn't that being disobedient?

Mr. BILBRAY. That may be in violation of law, but does not question the sovereignty of the King. The sovereignty of the territory was one of the biggest issues that was discussed. That is why diplomats and invading armies both fall under a violation or an incursion of the sovereignty of the jurisdictional authority.

Mr. BECERRA. Now the gentleman is placing further parameters on his definition of allegiance and to obedience. What of the situation of someone who in fact commits a violation of the law. Is being disobedient to the laws of the sovereignty, does that mean that that person not only should go to jail but lose citizenship?

Mr. BILBRAY. I think you'll see after the *Elk* case that at the time the child is born, if the parent is in violation of the sovereignty aspect of the common law, then it becomes triggered. But it does not become triggered afterwards. I think the *Elk* case clearly said you either receive it at time of birth or you have to go to naturalization.

The other aspect of it, and let me clarify in the other case that keeps being referred to with the *Wong Kim Ark* was just the opposite side of that. The parents were obedient and did recognize the sovereignty of the United States because they immigrated legally with permission. At the time the child was born, the parents were obedient and had reflected the sovereignty of the United States, and they could not take it away from the child afterwards.

Mr. BECERRA. So does this definition of obedience or allegiance, is it ephemeral, how long does it last? If you are obedient one day but disobedient the next, are you subject to losing your citizenship? Or is it only at one point in time?

Mr. BILBRAY. The *Calvin* case goes specifically to the fact of your presence on the territory.

Mr. BECERRA. Which means it could go on for——

Mr. BILBRAY. No. It goes on at the moment—basically, it applies to the moment of birth of the child and the presence. What is the presence of the parent at the time that they were on there. It goes back to a case basically of an occupation without the consent of the sovereign.

Mr. BECERRA. Then, Mr. Chairman, let me just close with this. If that is the definition, it is based on poignant time of birth. If you take look at the reading of the 14th amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof, I'm not sure how you'd determine if a newborn is showing allegiance or obedience to the jurisdiction of a country. But it seems to me that it would be very difficult to prove what the intent or the mind is of a newborn. It seems to me that you get yourself into a convolution of arguments to try to say that obedience or disobedience——

Mr. SMITH. Mr. Becerra, would you yield just for a minute?

Mr. BECERRA. Of course.

Mr. SMITH. "Subject to the jurisdiction" is going to be covered by three panelists who are members of our last panel today. I think we can probably continue the discussion if that's all right with you.

Mr. BECERRA. Thank you.

Mr. SMITH. Let me say to those who are present that we are going to recess until 2:30, at which time Mr. Canady is going to reconvene the subcommittee. Let me apologize. I will be a few minutes late because of a conflict in having to appear before another committee, but expect to be back shortly after 2:30.

Mr. Dellinger.

Mr. DELLINGER. Chairman Smith, I appreciate it. I just want to make a one sentence comment. That is that the 14th amendment might have been drafted to say as the Congressman would suggest

might flow from his reading of the English common law. It might have been drafted to say all persons born in the United States whose parents are obedient to its laws are citizens of the United States, but it doesn't say that. It's subject to the jurisdiction. That is the amendment we have.

Mr. SMITH. Thank you, Mr. Dellinger. The subcommittees will stand in recess until 2:30.

[Recess.]

Mr. CANADY [presiding]. The subcommittees will come to order. We have decided to have one final panel, so that the witnesses originally scheduled for panels three and four will be heard on the same panel. On today's final panel we have Joan Zinser, deputy director of the Income Maintenance Bureau of the San Diego County Department of Social Services. We will also hear from Prof. Peter Schuck, Yale University Law School, Prof. Gerald Neuman of the Columbia University Law School, Prof. Edward J. Erler of the Claremont Institute and California State University, San Bernardino. Our final witness will be Emily Jauregui Alcantar. I want to thank each of you for being with us today. We look forward to hearing your testimony.

Ms. Zinser.

STATEMENT OF JOAN ZINSER, DEPUTY DIRECTOR, INCOME MAINTENANCE BUREAU, SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES

Ms. ZINSER. Good afternoon, Chairman Canady, Mr. Becerra and staff. My name is Joan Zinser. I am the deputy director for the Income Maintenance Bureau of the Department of Social Services in San Diego County. That means I have responsibility for the administration of the AFDC, food stamp, and Medicaid programs; determining eligibility and access to those programs. I am here today to tell you about the effects of illegal immigration on the county's assistance programs and to present some other information regarding impacts on other county-funded services.

I'd like to put the concerns of San Diego County into some perspective for you. We share the international border with Tijuana, Baja California, Mexico. This border has the largest number of border crossings in the world. Seventy million people cross that border every year. This border sector also has the largest number of apprehensions of illegal aliens anywhere in the United States. Studies estimate the 1.6 million illegal aliens enter the United States annually through San Diego County, making the impact on our region enormous.

In 1993, illegal immigrants in San Diego County were estimated to be 7.9 percent of the population, or approximately 220,000 people. That is about equivalent to the population of Spokane, WA. Our county's population is 2.7 million. In 1993, a State senate report estimated that the State, local governments—primarily the county—and schools in San Diego incurred $304 million in costs to provide services to illegal immigrants. These costs were offset by only $60 million in taxes generated by illegal immigrants, leaving a net impact of $244 million to the taxpayer.

As mentioned earlier, by other speakers, when a child is a U.S. citizen and his parent is an undocumented immigrant, the child,

but not the parent, is eligible for AFDC benefits. In 1992, in San Diego County, there were 6,414 Medicaid funded births to undocumented immigrant mothers in San Diego County hospitals. This represented 38 percent of the Medicaid funded births in our county that year. About half of these moms applied for AFDC benefits for their babies. Thirty-four percent of these children remained on aid 1 year later. The cumulative effect of the citizen child cases continues to rise each year.

Public assistance is intended to support the citizen child. But when this aid is paid directly to the immigrant parent, which it is, it is no doubt used by that parent to support the entire family. Costs for providing AFDC to citizen children cases in San Diego County totaled $37 million in 1993, and we had about 5,000 cases. In the State of California, these citizen child cases made up 13.4 percent of the total AFDC caseload in October 1993.

Additional costs are incurred in child welfare services. When we combine the costs for out of home services for children and family maintenance services, this adds an additional $1.7 million.

Medicaid services are an increasingly large portion of the costs involved in illegal immigration. As I mentioned earlier, Medicaid paid for over 6,000 births in San Diego County in 1992. Although studies have shown that illegal aliens use fewer Medicaid services than do the age equivalent members of the general population, significant costs remain. Delivery costs are greater for babies whose moms don't necessarily get appropriate prenatal care. In addition, infectious diseases such as tuberculosis are also a concern for the county. San Diego County has historically carried large costs because undocumented immigrants with health problems seek services in our county. Many of these services are not funded by any Federal grants or transfer payments.

Costs associated with providing emergency and pregnancy related needs to the undocumented immigrants are paid for under restricted Medi-Cal benefits. During 1992, an estimated $37 million was paid for restricted Medi-Cal benefits. Other costs, including uncompensated care in hospitals, community clinics and other unfunded services elevated the costs in our county to over $50 million.

In the area of education, a recent video of students crossing the border and getting on a schoolbus in San Diego County in order to receive free education was shown nationwide. Locally, we have worked to make sure that this situation——

Mr. CANADY. That means 5 minutes has expired. If you could try to conclude your remarks as soon as possible.

Ms. ZINSER. It is difficult to total the costs of services for citizen children of illegal immigrants. However, the costs are substantial on local governments, particularly those that abut the border. The San Diego County Board of Supervisors urges the Federal Government to take the following actions: reserve citizenship for children of U.S. citizens and those whose presence in this country is legal under immigration laws, increase resources provided to the INS and Border Patrol, deny eligibility for health, educational services and social services to illegal immigrants, and fully compensate local agencies for any costs incurred in providing public services to illegal aliens and their children born in this country.

Thank you, on behalf of the board.

[The prepared statement of Ms. Zinser follows:]

PREPARED STATEMENT OF JOAN ZINSER, DEPUTY DIRECTOR, INCOME MAINTENANCE BUREAU, SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES

Good morning Chairman Smith and other honorable members of the Subcommittee on Immigration and Claims. I am Joan Zinser, Deputy Director of the San Diego County Department of Social Services. I direct the department's Income Maintenance Bureau, which has responsibility for AFDC, Food Stamps and medicaid eligibility determinations. I am here today to tell you about the effects of illegal immigration on the County's assistance programs, and to present information regarding impacts on other county-funded services.

To put the concerns of the County of San Diego into some perspective, you will recall that the International Border in San Diego County experiences the world's largest number of crossings, totaling over 70 million crossings per year. This border sector also has the highest number of apprehensions of illegal aliens anywhere in the United States. Studies estimate 1.6 million illegal aliens enter the United States annually through San Diego County, making the impact on our region enormous.

IMPACTS ON SAN DIEGO COUNTY

In 1993, illegal aliens in San Diego County were estimated to be 7.9% of the population, or a total of almost 220,000 illegal aliens in a county with a population of slightly over 2½ million. A 1993 California State Senate report estimated that the State, local governments—primarily the County—and schools incurred $304 million in costs to provide services to illegal aliens. These costs were offset by only $60 million in taxes generated by illegal aliens—leaving a net impact of $244 million.

WELFARE COSTS

When a child is a U.S. citizen, AFDC can be granted for the child but not the parent, if the parent is an undocumented immigrant. In 1992 there were 6,414 children born to undocumented immigrant parents in San Diego County hospitals. Each year, the illegal alien parents of nearly 2000 "citizen children" apply for and receive AFDC in San Diego County. The cumulative total of these "citizen child" cases continues to rise each year.

Public assistance is intended to support the citizen child, but is paid to the illegal alien parent and is, no doubt, used by the parent to support the entire family. Costs for providing AFDC to "citizen children" cases in San Diego totaled $37 million in 1993 for approximately 5430 AFDC cases.

Additional costs are incurred in Child Welfare Services. Combining costs for Out-of-Home and Family Maintenance services to families of illegal aliens results in an additional cost of $1.7 million.

MEDICAID AND OTHER HEALTH-RELATED COSTS

Medicaid services are an increasingly large portion of the costs involved in illegal immigration. In 1992, Medicaid paid for 6,414 births illegal alien mothers. Although studies have shown that illegal aliens use fewer Medicaid services than do the age-equivalent members of the general population, significant costs remain. Delivery costs are greater for babies with mothers lacking adequate prenatal care and many medical conditions are treated more cost-effectively in their early stages. Infectious diseases are also a major concern of the County. San Diego county has historically carried large costs because of illegal aliens with these problems. Costs associated with providing emergency and pregnancy related needs to illegal aliens are paid for under "restricted Medi-Cal benefits." During the 1992 calendar year, an estimated $37 million was paid for "restricted Medi-Cal benefits." Other costs, including uncompensated care in hospitals, community clinics, and other health services elevated the 1993 total costs to over $50 million.

CRIMINAL JUSTICE

A recent 90-day pilot project involved having INS Agents present in the county jails to interview those suspected of being an undocumented immigrant. Approximately 20% of the persons booked into the jails during that pilot were identified as being illegal aliens. With annual bookings of approximately 105,000 persons a year, it is estimated that up to 21,000 were illegal aliens.

According to the San Diego County District Attorney, 8,521 felony crimes were committed by illegal aliens between 1987 and 1992. Illegal aliens commit an estimated 22% of felony crimes committed in the county. The number of misdemeanors

committed during the same period in San Diego County by illegal aliens is estimated to be 17,000. In 1993, approximately 15.1% of the cost accrued in dealing with crimes were spent on illegal aliens. Costs for illegal aliens to the legal system totaled $151 million in the County of San Diego for 1993.

EDUCATION

Recently, a video of students crossing the border and getting on a school bus in San Diego County in order to receive free education was shown nationwide. Locally, we have worked to make sure that this situation does not recur, but education of the children of illegal aliens is also a significant cost. It is estimated that $60 million was spent in San Diego County in 1993 for education of illegal aliens.

SUMMARY

Total costs for providing services to the citizen children of illegal aliens cannot be clearly estimated. However, it is clear that a substantial number of persons come to San Diego County with the express purpose of obtaining citizenship and public benefits without regard for the law controlling immigration. The benefits accruing to citizens are an attraction to illegal aliens and represent a great cost to our County. San Diego County, and many others are facing a financial crisis of critical proportions. Expenditures for services are growing at a frightening rate, with no end in sight. It is the decisions made here in Washington that are often the basis for demands on local government. It is the conclusion of the Board of Supervisors of the County of San Diego that extending public benefits to those who have entered the country illegal is improper. To resolve many of the problems faced by San Diego County, we strongly urge the federal government to take the following actions: (1) Reserve citizenship for children of U.S. citizens and those whose presence in this country is legal under immigration laws; (2) Substantially increase resources provided to the Immigration and Naturalization Service and to the Border Patrol to control illegal immigration on the border; (3) Deny eligibility for health, educational, and social services to illegal aliens; and (4) Fully compensate Local Agencies for any costs incurred in providing public services to illegal aliens and their children born in this country.

The County of San Diego appreciates the opportunity to provide input to your subcommittee and is encouraged by the interest the subcommittee has shown in the problems caused by the granting of citizenship to children of illegal aliens. Please contact me if you or your staff need further information.

Mr. CANADY. Thank you, Ms. Zinser.

Professor Schuck.

STATEMENT OF PROF. PETER H. SCHUCK, YALE UNIVERSITY LAW SCHOOL

Mr. SCHUCK. Mr. Chairman, members of the subcommittee, thank you for inviting me to testify. My name is Peter Schuck. Since 1979, I have been a teacher at Yale Law School where I teach, conduct research and write on immigration law among other areas.

In 1985, Rogers Smith, a political scientist at Yale, and I published a book on this subject, "Citizenship Without Consent." We later summarized the main argument of the book in an article. Our book and article elicited considerable controversy among academics and other specialists in the immigration field. At least one of our critics, Professor Neuman sitting beside me, is testifying today.

In my testimony I describe the reasons why we found the birthright citizenship rule worth studying and felt that its anomalies and perverse incentives called it into question. I am not going to review that at this point, nor am I going to review the constitutional analysis that led us to the conclusion that the birthright citizenship rule is not constitutionally required. I would rather devote my brief time to discussing the question of whether Congress ought to change the rule.

Although my view is that the best interpretation of the constitutional materials is that the current rule is not constitutionally required, and that Congress could therefore alter it by statute if it wished to do so, I strongly believe that if the Congress were disposed to change the rule, it should do so not by statute but by constitutional amendment, difficult and time consuming as that might be. In my testimony I explain the reasons for that strongly held view.

Proceeding to the policy question at page five of my testimony, I explain why the birthright citizenship rule is vulnerable to criticism. I note the perverse incentives and local costs and the offense to the consensual principles on which our Constitution and democracy are founded, and the offense to common morality and common sense in conferring citizenship on children whose only connection to the United States is that their mothers crossed the border in time to give birth here.

However, and this is the point I would like to emphasize in the remainder of my time, the analysis cannot stop here. We live in a complex world in which the moral and practical arguments seldom fall on only one side. Birthright citizenship has some important advantages, even in a liberal polity like ours in which consent is the central political value. Our current rule possesses the values of simplicity and administrative clarity in an area in which uncertainty and bureaucratic discretion would be particularly repugnant. But its most important advantage is that it provides a crude but pragmatic accommodation to a longstanding apparently intractable policy failure, the substantial ineffectiveness of our border and interior immigration enforcement programs.

Our feckless enforcement policies have created the possibility, indeed the certainty, that a large group of illegal aliens are nevertheless long-term or even life-long residents in the United States. Without a birthright citizenship rule or another amnesty, these illegals, their children, and their children's children will continue to be outsiders, mired in an inferior and illegal status, and deprived of the capacities of self-protection and self advancement.

Whatever the disadvantages of birthright citizenship, it has the great virtue of limiting the tragic effects of this problem of inherited outlawry by confining illegal status to a single generation for each family. The value of this should not be underestimated. In order to gain a vivid picture of what a society without birthright citizenship looks like, we need only look at Germany today.

Today, Germany's foreign-born constitute almost nine percent of its total population, higher than the Unites State's 8.7 percent. Millions of them have lived in Germany for two or more generations. Germany, of course, is in many respects an admirable, highly successful society. With respect to its assimilation of these long-term residents, however, it has failed miserably. It countenances a level of isolation among second and third generation residents that we in the United States, whatever our other problems, have largely managed to avoid. Part of Germany's failure has been to view most of its foreign-born population as merely temporary workers, even after it became plain that the workers were not going to return home voluntarily—indeed, their families often joined them in Ger-

many—and that the Government was not prepared to deport them forcibly.

Studies indicate that these families, many of which are in their third generation in Germany, have not been assimilated into German society. They constitute a more or less permanent class of the disadvantaged. An important reason for this lack of integration is Germany nationality law, which utterly rejects birthright citizenship and bases citizenship instead on parentage on ethnic and linguistic affinity.

Naturalization of aliens who lack German ethnicity is possible, but the conditions are rather restricted when compared to naturalization policies in the United States. Few of the foreigners without German ethnicity have naturalized, and the level of mistrust and alienation by these foreigners has grown so great that even a liberalization of the naturalization law may not succeed in inducing many of them to join the German Nation. Unless this situation changes, there is a great risk that they and their children and grandchildren will continue to live there as strangers in a strange land.

As tragic as this situation is in Germany, our situation in the United States seems potentially worse in several respects. If we eliminate birthright citizenship for illegal alien children, the relative gravity of our problem may well increase. Germany's four million foreigners after all, are there legally. Most of them enjoy the same social, legal and economic rights as Germans do. As for political rights, most of Germany's foreigners are at least eligible to naturalize once they have met the 10 year residency requirement.

In contrast, the United State's 4 million illegal aliens are just that, illegal—with all the cumulative disadvantages that illegal status entails. So long as they are illegal——

Mr. CANADY. If you could try to conclude as soon as possible.

Mr. SCHUCK. Yes. Well, I'll complete this paragraph and then summarize the principles that I think ought to guide us.

So long as they are illegal, they can never naturalize. Without a birthright citizenship rule, their children and grandchildren can never naturalize. Yet we can be sure that regardless of their status, they will continue to have children just like other people in their childbearing years, which the vast majority of illegal aliens are. These children remain permanently disadvantaged. American society, not just the children, will suffer.

In concluding my testimony, I'd like to summarize four principles that I think ought to guide the subcommittees as you proceed to consider this issue.

One, it would be extremely imprudent, even irresponsible, to eliminate birthright citizenship for illegal alien children unless and until Congress adequately addresses the competing social values that birthright citizenship, however crudely, serves to protect. In particular, substantial increase in the effectiveness of immigration enforcement, thereby significantly reducing the number of illegal aliens who can reside in the United States for long periods of time, should be an essential precondition to elimination of the current rule.

Two, so long as the current birthright citizenship rule continues, the immigration law should deprive the parents of any opportunity

to obtain immigration benefits through their birthright citizen children.

Three. If birthright citizenship is eliminated for illegal alien children, but such children nevertheless continue to reside in the United States, they should not be denied fundamental rights, rights that serve not only their interests but those of the American society in which they may spend much of their lives. I am not now prepared to say precisely what those rights should be, but they should certainly include access to public schools and emergency medical care.

Finally, if Congress decides to eliminate the current birthright citizenship rule, it must substitute a better rule, one that harmonizes the compelling social values more effectively than our current rule does. In this spirit, Congress should consider some variant of the approach, long contained in the French nationality law and also to some extent in the British, which seeks not to eliminate birthright citizenship for illegal alien children altogether but to limit it to compelling categories of individuals. I explain in the remainder of my testimony how that might be done.

In conclusion, let me emphasize once again the importance of recognizing the complexity and inevitably compromised character of the policy choice that you face. With all due respect, I believe that the pending legislation utterly fails to recognize either this complexity or the need to compromise the conflicting values. I would be the last person in the world to deny that the current rule granting birthright citizenship offends our consensual principles and creates perverse incentives. I do not wish to be understood as defending a rule that we subjected to a book length analysis and critique.

Even so, the U.S.'s situation could be worse, and I fear that the pending legislation would indeed make it worse. Genuine reform requires the Congress to address the root problem of illegal migration by taking effective steps to reduce the number of people who live in the United States illegally. Then and only then can the Congress responsibly consider eliminating birthright citizenship for illegal alien children. Thank you.

[The prepared statement of Mr. Schuck follows:]

PREPARED STATEMENT OF PROF. PETER H. SCHUCK, YALE UNIVERSITY LAW SCHOOL

Chairmen Smith and Canady, and Members of the Subcommittees: My name is Peter Schuck. Since 1979 I have been a teacher at Yale Law School, where I am the Simeon E. Baldwin Professor. One of the areas in which I teach, conduct research, and write is immigration law. In 1985, Rogers M. Smith, a political scientist at Yale specializing in American politics; and I published a book on the subject of this hearing: "Citizenship Without Consent: Illegal Aliens in the American Polity" (Yale University Press). We later summarized the main argument of the book in an article entitled "Consensual Citizenship" published in the magazine "Chronicle" (July 1992). Our book elicited considerable controversy among academics and other specialists in the immigration field. At least one of our critics, Professor Gerald Neuman of Columbia Law School, is testifying before you today.

Rogers Smith and I were initially moved to write our book out of a curiosity about the origins and justifications of what is often called "birthright citizenship" (or *jus soli*). As you know, birthright citizenship is a status granted pursuant to the principle that the Constitution, with certain traditional exceptions well established at common law, confers U.S. citizenship on any individual who is born on American territory simply by virtue of that birth on the territory. Tradition has it that this principle was established by the Citizenship Clause of Section 1 of the Fourteenth Amendment, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside." It has long been assumed—although no court has ever had occasion to hold—that this Clause extends automatic, constitutionally required birthright citizenship to the native-born children of illegal aliens and to "non-immigrant aliens" (i.e., temporary visitors).[1]

Several things about birthright citizenship struck us as odd, even anomalous, in light of the political theory and constitutional history of the American polity. First a principle of ascriptive citizenship—automatically granting citizenship on the basis of the accident of an individual's birth in a particular place—seemed inconsistent with the consensual assumptions that guided the political handiwork of 1776 and 1787. In a polity whose chief organizing principle was and is the liberal, individualistic idea of consent, mere birth within a nation's border seems to be an inadequate measure or expression of an individual's consent to its rule and a decidedly crude indicator of the nation's consent to the individual's admission to political membership. Second, this departure from consensual citizenship seemed especially anomalous in 1985 (when our book was published), a year in which an estimated 4–5 million aliens already lived in the U.S. illegally, the INS had stopped more than 1.3 million more as they attempted to enter illegally, and an unknown but non-trivial number of these illegal aliens were given birth to children on U.S. soil. In 1868, when the Citizenship Clause was ratified, the federal government had not yet limited immigration; there was no such thing as an illegal alien under federal law. (The first such limitation was enacted in 1875).[2] Smith and I asked ourselves the following question: How likely was it that the Framers of the Fourteenth Amendment would have intended the Citizenship Clause to confer automatic, constitutional birthright citizenship on such children?

In order to answer this question, we investigated the history of the political theory and legal regulation of citizenship in the U.S., especially the principles and understandings that guided the Framers of the Citizenship Clause. These principles and understandings, and their implications for the birthright citizenship of illegal alien children, are the subject of our book. Rather than discuss our analysis in detail here, I shall simply summarize our findings and conclusions.

Before doing so, however, I wish to draw a fundamental distinction between two entirely separate questions that we considered in our book and that your Subcommittees must consider in evaluating the bills that are before you.

First, there is the constitutional question. Here, the issue is whether birthright citizenship for illegal alien children is required by the Citizenship Clause. If it is, then any change in the current birthright citizenship rule can only be made through a constitutional amendment. Our answer to this question, which I explain immediately below, is that the best interpretation of the constitutional materials indicates that the current rule is not constitutionally required and that the Congress could therefore alter it by statute if it wished to do so. Despite this conclusion, I strongly believe that if the Congress were disposed to change the rule, it should do so not by statue but by constitutional amendment, difficult and time-consuming as that path might be. Although I am confident that our interpretation is correct, it is nevertheless probably a minority view among the legal commentators who have considered it, and it is also inconsistent with Supreme Court dictum in a 1982 decision, *Plyler* v. *Doe*. Such a change, moreover, would cut back on a valuable legal and political status and alter the traditional understanding of an important constitutional provision. So far-reaching a change should not be adopted by a transient majority in Congress. Finally, changing the rule could affect the vital interests of many states whose views could be best elicited through the kind of deliberation entailed by a constitutional amendment process.

The second question is one of public policy: Assuming that Congress possesses the constitutional power to alter the traditional birthright citizenship rule, would it be

[1] For the sake of simplicity, I shall refer to both categories—the native-born children of illegal alien parents, and the native-born children of legal non-immigrant aliens—collectively as "illegal alien children" even though the latter group is not in the U.S. illegally. I believe that the constitutional and policy arguments with respect to the birthright citizenship status of both groups are essentially the same. Although some distinctions between them could be made, such distinctions are unnecessary for present purposes.

[2] Professor Neuman has argued that some American states restricted entry of aliens into their territories and that the federal government had banned the international slave trade, concluding from this that some persons were probably in the United States in violation of these restrictions, persons who could therefore be considered "Illegal aliens." The states' bans, however, applied only to persons within their own borders, not the U.S. more generally. They were also known to be of dubious constitutionality and were eventually overturned by the Supreme Court. Although Newman is correct that some Africans were probably in the U.S. in violation of the slave trade ban, this fact never received any explicit attention by the Framers of the Fourteenth Amendment or the courts.

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wise for Congress to do so? On this question, our book answered with a "perhaps." After considering a number of substantial arguments on both sides of the question, we concluded that eliminating birthright citizenship for illegal alien children and nonimmigrant aliens might be desirable under certain preconditions. Any such change must operate prospectively and should not be used to facilitate harshly restrictive immigration policies. The change must be part of a larger program to control illegal migration (thereby limiting the number of aliens, especially children, in the U.S. illegally) through a combination of amnesty and enforcement policies[3] and it must assure non-discriminatory treatment (which is not the same as equal treatment) of the illegal aliens who still elude detection or fail to gain amnesty. Today, ten years later, we are more skeptical about the policy wisdom of simply eliminating birthright citizenship for such children. Our most important precondition—effective control of illegal migration, thereby minimizing the number of children growing up in the U.S. who would be denied birthright citizenship—has not, and perhaps cannot, be met. We therefore find even more disturbing the evidence from European nations indicating that societies that maintain high barriers to citizenship for people who will continue to live in the society for most of their lives (whether legally or illegally) bear terrible social costs. Birthright citizenship should not be changed unless it can effectively deal with this important problem.

THE CONSTITUTIONAL ISSUE

On the constitutional issue, our research led us to the conclusion that birthright citizenship for illegal alien children and nonimmigrant aliens is not constitutionally required.

The immediate purpose of the Citizenship Clause and the preoccupation of those who framed it, of course, was to assure citizenship to the newly freed slaves, whose capacity for citizenship had been denied by the Supreme Court in the infamous *Dred Scott* decision that ushered in the Civil War. The Framers obviously did not have the problem of illegal aliens on their minds, for the simple reason that no such category then existed. The tasks, then, are to identify the underlying principle that they thought they were adopting, and to apply that principle to the illegal alien children question.

In the Clause, the Framers qualified birthright citizenship by denying it to those who not only are born in the U.S. but are also "subject to the jurisdiction thereof." In adopting this limitation, they sought to add to the ascriptive birthright citizenship rule a conception of the consensual connection between an individual and his or her government necessary to support birthright citizenship. This conception, which derived from Locke and certain continental theorists of the late 18th century who strongly influenced American public law, was profoundly political not just territorial. The connection implied by the phrase "subject to the jurisdiction thereof" had to be more than simply the individual's subjection to the government's police power and criminal jurisdiction, more even than the individual's manifest desire for membership in the political community and the absence of any similar allegiance to another government. It also demanded a more or less complete, direct power by government over the individual, and a reciprocal relationship between them at the time of birth in which the government consented to the individual's presence and status and offered him or her complete protection. In this view, the Constitution extended the protection of citizenship to the child. It did so, however, only through the government's consent to the parents, whose own consent depended on the government's promise that citizenship would be available to their children. In this way, even birthright citizenship's inherently ascriptive nature flowed from consensualist commitments.

Three types of evidence support our conclusion that the Framers' use of the "subject to the jurisdiction thereof" phrase of the otherwise ascriptive Citizenship Clause was meant to require this kind of connection between individual and government as a precondition for birthright citizenship. The first—the Lockeian, public law heritage that the Framers brought to their task—has just been discussed. The second is the legislative history of the "subject to the jurisdiction thereof" phrase. The congressional debates established the Framers' understanding that the Clause would continue to confer citizenship on the native-born children of resident aliens and of Indians who paid taxes, and would continue to exclude the categories of native-born children traditionally excluded by common law tradition, principally those of diplomats serving in the U.S. But in addition to resolving these specific questions of the Citizenship Clause's coverage, the debates also brought to the surface the

[3] We wrote in 1985, well before the amnesty and employer sanctions programs had been enacted.

central elements around which the Framers organized their more general principles defining the scope and meaning of the Clause. The chief architects of the Clause and indeed of the Fourteenth Amendment as a whole, Senators Trumbull and Howard, articulated their understanding that the "subject to the jurisdiction thereof" criterion entailed the requirement of "full and complete jurisdiction," a jurisdiction precluding "allegiance to anybody else." This requirement would clearly exclude the then non-existent and thus unmentioned category of illegal aliens, who owe full allegiance to their own countries but none to ours. The third type of evidence was the Supreme Court's interpretation of the "subject to the jurisdiction thereof" limitation in two cases. In *United States* v. *Wong Kim Ark*[4] the Court recognized birthright citizenship for the child of Chinese parents who were legally resident in the U.S. but were themselves legally ineligible for citizenship. In *Elk* v. *Wilkins*[5] it denied birthright citizenship to an Indian who had been born into a tribe on U.S. soil but subsequently left the tribe to live in white society. (Forty years later, Congress extended birthright citizenship to Indians by *statute*.) In these cases, the Court drew both on the public law authorities and on the Framers' congressional debates to elaborate the interpretation that I have just described.

We conclude, therefore, that the Citizenship Clause does not prevent Congress from withholding birthright citizenship from illegal alien children should it wish to do so.

THE POLICY ISSUE

The question of whether Congress should do so in the exercise of its policy discretion is a genuinely difficult one. The arguments against continuing to extend birthright citizenship to illegal alien children, as the current rule does, are clear enough. The prospect of acquiring such a valuable status for one's children almost certainly constitutes an incentive for the parents to migrate here illegally. It is impossible to know precisely how important a factor this is in shaping their migration decisions, but one must presume that at the margin it is a non-trivial consideration. I have done no original research on the questions of the number of illegal alien women who gave birth in the U.S. at least in part to obtain citizenship for their children, and the costs that they impose on local communities' public hospitals and other services. The burdens are said to be heavy, however, and I have no reason to doubt that this is true. Other witnesses who have studied these empirical issues will presumably testify about them. If one believes, as I and most Americans do, that the continuing flow of illegal migration to the U.S. is problematic and should be further limited, then any rule that attracts more illegals is plainly counterproductive. When one adds to these perverse incentives and local costs the offense to the consensual principals on which our Constitution and democracy are founded, and the offenses to common morality and common sense in conferring citizenship on children whose only connection to the U.S. is that their mothers crossed the border in time to give birth here, the argument in favor of change is even more compelling.

But the analysis cannot stop here. We live in a complex policy world in which the moral and practical arguments seldom fail only on one side. Birthright citizenship—even for illegal alien children—has some important advantages, even in a liberal policy like ours in which consent is the central political value. Our current rule possesses the values of simplicity and administrative clarity in an area—the determination of citizenship status—in which uncertainty and bureaucratic discretion would be particularly repugnant. But its most important advantage is that it provides a crude but pragmatic accommodation to a long-standing, apparently intractable policy failure: the substantial ineffectiveness of our border and interior immigration enforcement programs.[6] Our feckless enforcement policies have created a possibility, indeed a certainty, that a large group of illegal aliens are nevertheless long-term or even lifelong residents in the U.S. Without a birthright citizenship rule or another amnesty,[7] these illegals, their children, and their children's children will continue to be outsiders mired in an inferior and illegal status and deprived of the capacities of self-protection and self-advancement. Whatever the disadvantages of birthright citizenship, it has the great virtue if limiting the tragic effects of this problem of inherited outlawry by confining illegal status to a single generation for each family.

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[4] 169 U.S. 649 (1898).

[5] 12 U.S. 94 (1884).

[6] The number of illegals already in the U.S. and the number now attempting to enter illegally appear to have reached the levels the prevailed before the enactment of employer sanctions in 1986.

[7] As a political matter, another amnesty seems highly unlikely for the foreseeable future.

The value of this should not be underestimated. In order to gain a vivid picture of what a society without birthright citizenship looks like, we need only look at Germany today. I and Professor Neuman, who is perhaps the leading American academic expert on German public law, are currently participating with thirty American and German scholars in a comparative study of U.S. and German immigration and nationality policies. Our study includes an examination of the two countries' policies toward assimilation of long-term residents.

For more than forty years, Germany has been a country of immigration, although it does not think of itself as such.[8] Between 1955 and 1973, Germany recruited workers from Italy, Spain, Greece, Turkey, Morocco, Portugal, Tunisia, and Yugoslavia to work in German factories and fields, largely on a rotational basis. By 1973 when Germany abruptly halted this recruitment, 4 million foreigners lived in West Germany, 6.5% of its population. By 1994, approximately 7 million foreigners lived there, and the size of this group will increase rapidly in the future.[9] Today, Germany's foreign-born constitute almost 9% of its total population, higher than the U.S.'s 8%, and millions of them have lived in Germany for two or more generations.

Germany, of course, is in many important respects an admirable, highly successful society. With respect to its assimilation of these long-term residents, however, it has failed miserably; it countenances a level of isolation among second- and third-generation residents that we in the U.S., whatever our other problems, have largely managed to avoid. Part of Germany's failure has been to view most of its foreign-born population as merely temporary workers, even after it became plain that the workers were not going to return home voluntaqrily—indeed, their families often joined them in Germany—and that the government was not prepared to deport them forcibly. Studies indicate that these families, many of which are in their third generation in Germany, have not been assimilated into German society; they constitute a more a less permanent class of the disadvantaged.[10]

An important reason for this lack of integration is German nationality law, which utterly rejects birthright citizenship and bases citizenship instead on parentage (*jus sanguinis*) and ethnic and linguistic affinity. Naturalization of aliens who lack German ethnicity is possible but the conditions are rather restrictive when compared to naturalization policies in the U.S. Few of the foreigners without German ethnicity have naturalized,[11] and the level of mistrust and alienation by these foreigners has grown so great that even a liberalization of the naturalization law may not succeed in inducing many of them to join the German nation. Unless this situation changes, there is a grave risk that they and their children and grandchildren will continue to live there as strangers in a strange land.

As tragic as this situation is in Germany, our situation in the U.S. seems worse in several respects, and if we eliminate birthright citizenship for illegal alien children the relative gravity of our problem many well increase. Germany's four million foreigners, after all, are there legally and most of them enjoy the same social, legal, and economic rights as Germans do. As for political rights, most of Germany's froeigners are at least eligible to naturalize once they have met the ten-year residency requirement. In contrast, the U.S.'s four million illegal aliens are just that—illegal, with all the cumulative disadvantages that illegal status entails. So long as they are illegal, they can never naturalize, and without a birthright citizenship rule, their children and grandchildren can never naturalize. Yet we can be sure that regardless of their status, they will continue to have children just like other people in their childbearing years (which the vast majority of illegal aliens are). If these children remain permanently disadvantaged, American society, not just the children, will suffer.

The illegal parents and children, of course, could always go back where they came from if their disadvantage is too oppressive. Many of them will indeed go home. The problem, however, is that many others will not—partly because those places will no longer be (and in the case of the children, many never have been) home to them,

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[8] The data on Germany that follow are drawn from Rainer Munz and Ralf Ulrich, "Changing Patterns of Migration: The Case of Germany, 1945–1994, unpub. ms prepared for German-American Migration and Refugee Policy Study, March 1995.

[9] In recent analysis, demographers projected a foreign population in Germany in 2010 of between ten and sixteen million, representing between 12 and 18% of the total population. Munz and Ulrich, pp. 35–37. Unless Germany dramatically changes its rules, only a tiny fraction of these foreigners will naturalize.

[10] See, e.g., chapters by Munz et al. and by Richard D. Alba in "*Opening the Door; US and German Policies on the Absorption and Integration of Immigrants*" (Peter H. Schuck, Klaus Bade, and Rainer Munz, eds., forthcoming 1997).

[11] Between 1974 and 1992, a total of only 311,000 discretionary naturalizations of foreigners without Germany ethnicity occurred—despite the fact that more than half of the foreigners living in Germany fulfill the required residential period of ten years.

and partly because however disadvantaged they may be in a U.S. that bars them and their children from obtaining citizenship, they might rationally conclude that they would be even worse off back in their home country. In short, millions of them will remain in the U.S. once they have established themselves here. Again, the main point for purposes of evaluating the pending legislation is not that this denial of access to citizenship would be unfair to them; depending on the one's definition of fairness, it may or may not be unfair. The main point is that having this permanent underclass in our midst would be very damaging to American society.

We are, then, between a rock and a hard place—between the current birthright citizenship rule, whose anomalous and perverse character I have devoted a book to demonstrating, and the risk that eliminating this rule will transmogrify our already large illegal population, with all of the problems it poses, into a much larger, multigenerational, indeed permanent, alien underclass. However justified, expressions of moral indignation and condemnation of illegal alien mothers who give birth in American hospitals will not help to resolve this dilemma.

The only way that it can be truly resolved is to reduce the number of illegal aliens entering and living in the U.S. Generally speaking, this can be done in only two ways—through more effective enforcement of the immigration laws, and through an amnesty for those that remain or manage to elude the INS. The first is a hardy perennial, a permanent motif of congressional hearings like this—yet despite many more resources for the INS and stringent enforcement authority, the situation never seems to improve very much. Although the jury is still out on Operation Hold the Line, for example, there is evidence that it too will prove to be, at best, only modestly effective in the long run.[12] The second, amnesty, essentially defines the problem away and in any event is politically unthinkable for the foreseeable future.

Where does this leave us? We face a very hard policy choice, one that cannot produce a wholly satisfactory outcome but that might produce a better compromise than does either the status quo or the proposed legislation. I would suggest that any change in the birthright citizenship rule should adhere to the following four principles:

1. It would be extremely imprudent, even irresponsible, to eliminate birthright citizenship for illegal alien children unless and until Congress adequately addresses the competing social values that birthright citizenship, however crudely, serves to protect. In particular, a substantial increase in the effectiveness of immigration enforcement, thereby significantly reducing the number of illegal aliens who can reside in the U.S. for long periods of time, should be an essential precondition to elimination of the current rule. Unfortunately, the legislative proposals pending before the Subcommittees would simply eliminate the current rule without in any way altering the conditions that have caused our present policy dilemma. Accordingly—and despite the major problems with the current rule that we analyzed in our book—I would oppose these proposals.

2. So long as the current birthright citizenship rule continues, the immigration law should deprive the parents of any opportunity to obtain immigration benefits through their birthright citizen children.

3. If birthright citizenship is eliminated for illegal alien children but such children nevertheless continue to reside the U.S., they should not be denied fundamental rights, rights that serve not only their interests but those of the American society in which they may spend much of their lives. I am not now prepared to say precisely what those rights should be but they should certainly include access to public schools and to emergency medical care.

4. If Congress decides to eliminate the current birthright citizenship rule, it must substitute a better rule, one that harmonizes the competing social values more effectively than our current rule does. In this spirit, Congress should consider some variant of the approach, long contained in the French nationality law, which seeks not to eliminate birthright citizenship for illegal alien children altogether but to limit it to compelling categories. Under the French approach, birthright citizenship is restricted to those children who represent the third generation of their families in the country, or who have grown to maturity in the country.[13] First, drawing on the

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[12] See, e.g., Verne Kopytoff, "Mexican Immigrants Find Rugged Terrain Easier," N.Y. Times, November 26, 1995, p. 30 (migrants diverted to more eastern crossing points) Frank D. Bean et al., Illegal Mexican Migration & the United States/Mexico Border: The Effects of Operation Hold the Line on El Paso/Juarez (July 1994), p. 124 (operation more successful as to local crossers than among long-distance migrants, who can go around the line).

[13] In 1889, France adopted its "double *jus soli*" as well as the general statutory framework for permitting children born in France of parents not born in France to become citizens after a certain period of residence. In 1993, France amended the law to provide that a child born in France of foreign parents who were not born in France can apply for French citizenship between the ages of 16 and 21 if the child has resided in France for the preceding five years and meets

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French principle of "double *jus soli*" a child who is born in the U.S. would be a birthright citizen if one of the parents was born in the U.S., even if that parent remains in illegal status. This would at least prevent the cumulation of the inherited disadvantage of illegal stat is from extending beyond the second generation, as it can today in Germany. It would also minimize problems of proof because a "double *jus soli*" child need only provide the birth certificate of one U.S.-born parent in addition to the child's own birth certificate. A second attractive principle of the French system that we might adopt is that illegal alien children at some point be permitted to acquire U.S. citizenship upon a showing that they have resided here for a substantial, more or less continuous period of time, and perhaps can satisfy other reasonable conditions such as the absence of a serious criminal record. Again, this would recognize the continuing reality of long-term residence in the U.S. of some illegal aliens, and seek to make a social virtue of that necessity by enabling them to become integrated into the society in which, for better or for worse, they have grown up.

In conclusion, let me emphasize once again the importance of recognizing the complexity and inevitably compromised character of the policy choice that the Congress faces. With all due respect, I believe that the pending legislation utterly fails to recognize either the complexity or the need to compromise the conflicting values. I would be the last person in the world to deny that the current rule granting birthright citizenship offends our consensual principles and crates perverse incentives. I do not wish to be understood as defending a rule that we subjected to a book-length analysis and critique. Even so, the U.S.'s situation could be worse—and I fear that the pending legislation would indeed make it worse. Genuine reform requires the Congress to address the root problem of illegal migration by taking effective steps to reduce the number of people who live in the U.S. illegally. Then—and only then—can the Congress responsibly consider eliminating birthright citizenship for illegal alien children. If the Congress nevertheless decides to repeal the rule now—before it completes the more fundamental task of controlling illegal immigration—it has an obligation to ensure that the illegal alien children, who through no fault of their own are caught in a tragic statusless situation, can in time become American citizens and truly join the society in which they will have invested their pasts and are likely to invest their futures.

Mr. CANADY. Professor Neuman.

STATEMENT OF PROF. GERALD L. NEUMAN, COLUMBIA UNIVERSITY LAW SCHOOL

Mr. NEUMAN. Mr. Chairman and members of the subcommittee, I am honored to have been invited to testify with regard to proposals to amend the citizenship laws. I have given a fuller discussion with documentation in the written supplement to my testimony.

To state my conclusions briefly: First, the constitutional law is clear. Congress has no power whatsoever to deny U.S. citizenship to children born in the United States to nonimmigrant or illegal alien parents. Second, as a matter of policy, there are strong reasons that favor preservation of the current rule.

The citizenship clause of the 14th amendment guarantees citizenship to all persons born in the United States and subject to the jurisdiction thereof. The purpose of the clause was to overturn the *Dred Scott* decision, which had excluded African-Americans from citizenship, and more broadly to guarantee that the U.S. population would not contain a hereditary caste of noncitizens vulnerable to exploitation.

The meaning of the phrase "subject to the jurisdiction" has been well established for a century. It means actual subjection to the lawmaking power of the United States. It echoes the English common law notion of the King's protection. The common law excep-

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certain other conditions. French Civil Code, Art. 19-3 and Art. 21-7. Prior to 1993, such a child automatically acquired French citizenship at the age of 18 without having to apply for the status.

tions included children of foreign diplomats, who were legally immune from domestic law, and children born to women accompanying invading armies, who were practically immune from domestic law. The original U.S. interpretation also included children born as members of Indian tribes, which were separate self-governing societies over which Congress did not exercise direct lawmaking authority.

Nothing in the citizenship clause requires that the parents of a child born in the United States must be permanent residents rather than temporary visitors or illegal aliens for the child to be subject to the jurisdiction of the United States.

This well-established understanding has been questioned today because of a contrary theory invented in a book published in 1985 by Profs. Peter Schuck and Rogers Smith. I am very sorry to be so critical of my friend Peter Schuck, but even Homer can nod, and that book's argument is poorly reasoned and historically inaccurate.

In the limited time available, I can emphasize only one of the flaws in the revisionist argument. To reconcile their theory with the citizenship clause, Professors Schuck and Smith offer an unprecedented explanation of "jurisdiction." They say it means, "A more or less complete, direct power by government over the individual, and a reciprocal relationship between them at the time of birth in which the Government consented to the individual's presence and status and offered him complete protection." In plain English, a child would not be subject to the jurisdiction of the United States unless the United States consented to this child's status as a citizen.

First, this is completely circular. It would really guarantee no one citizenship at birth. Second, no one else has ever used the term "jurisdiction" this way. This peculiar definition illustrates the impossibility of the revisionist project. There is no reasonable interpretation of the constitutional language that will accomplish its goals. Nor can the argument be reconciled with the legislative history of the 14th amendment or the Supreme Court's explanation of the citizenship clause in *Wong Kim Ark*. Congress has no tenable basis for attempting to amend the citizenship statutes without a constitutional amendment.

I have only time, if any at all, to list briefly some of the other problems raised by the proposed amendments to the citizenship clause. At the outset, it must be recognized that changing the citizenship rule would not remove the children of illegal alien parents from the United States. In fact, it would not even make a substantial contribution to the enforcement of the immigration laws. Whatever the citizenship rule may be, many thousands of these children will remain in the United States. Given that fact, the United States benefits greatly by recognizing them as citizens.

The proposed amendments would harm U.S. society by creating a hereditary caste of illegal alien inhabitants. Some of the proposed amendments would deny citizenship to children born to lawfully admitted aliens who were not considered residents. There is no social problem justifying this change, and it could harm U.S. society by creating hereditary categories of legal alien inhabitants.

The current rule is a bright line rule that protects all native born citizens. The proposed amendments would make the citizenship of native born citizens less secure, because citizenship would be more difficult to prove once it depended on the status of one's parents and grandparents and so on, rather than on one's place of birth.

The proposed changes are incomplete because they withdraw citizenship from certain children without specifying what the status of those children will be and without providing those children any substitute protections for their rights.

I can just refer you to my written testimony for additional problems raised by the proposed amendments. I thank you for the opportunity to address them.

[The prepared statement of Mr. Neuman follows:]

PREPARED STATEMENT OF PROF. GERALD L. NEUMAN, COLUMBIA UNIVERSITY LAW SCHOOL

I. INTRODUCTION AND SUMMARY

Mr. Chairman and members of the Subcommittee, I am honored to have been invited to testify with regard to H.R. 705, H.R. 1363, and other proposals to amend the citizenship laws of the United States to deny U.S. citizenship at birth to certain categories of children born in the United States. These various proposals raise a lengthy series of questions, because they address different categories of alien parents, and because some of them attempt to accomplish their goals by ordinary legislation, while others contemplate amendments to the Constitution.

Nonetheless, a brief summary of my testimony is possible: first, a clear statement of law: unless the constitution is amended, Congress has no power whatsoever to deny U.S. citizenship to children born in the United States to nonimmigrant or illegal alien parents. Second, as a matter of policy: there are strong reasons why the birthright citizenship for the children of nonimmigrants and illegal aliens should be preserved. Third, the proposals to amend the Citizenship Clause of the Fourteenth Amendment raise further problems of constitutional policy.

II. WHY CONGRESS HAS NO POWER TO DENY U.S. CITIZENSHIP TO THE NATIVE-BORN CHILDREN OF NONIMMIGRANTS AND ILLEGAL ALIEN PARENTS

A. The meaning of the citizenship clause of the fourteenth amendment

The Citizenship Clause of the Fourteenth Amendment reads: "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The longstanding interpretation of this Citizenship Clause guarantees American citizenship to all children born to aliens within U.S. territory, with a few minor exceptions I will mention later. The status of the alien parents is irrelevant; they may be permanent residents, lawful nonimmigrants, or unlawfully present. The United States thus follows a version of the jus soli rule of citizenship, citizenship by right of the soil, which it inherited from the common law of England.

The historical purpose of this clause is well known: it was intended to overrule the most infamous decision in U.S. constitutional history, the Dred Scott decision. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). One of the holdings of that case was that the jus soli rule of citizenship applied only to whites: free persons of African descent could not be citizens of the United States, even if they were born in the United States.

The original text of the Constitution had failed to specify any criteria for citizenship in the United States, and the jus soli rule had been followed as part of our common law heritage. That omission had made the Dred Scott decision possible. After the Civil War, Congress sought to remedy that tragic error. Senator Howard, the author of the Citizenship Clause, introduced it with the following explanation: "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (remarks of Sen. Howard).

The framers of the Fourteenth Amendment had strong reason for desiring a constitutional settlement of the issue of birthright citizenship. They had just overthrown a system founded on denial of political membership in the country to a hereditary category of inhabitants. The Citizenship Clause was designed to prevent

that situation from ever happening again. Both the proponents and the opponents of the Citizenship Clause understood this. For example, Senator Cowan, a vehement opponent of the Fourteenth Amendment, complained that granting citizenship to the children of Chinese alien parents on the Pacific Coast would prevent the states from "dealing with [the Chinese] as in their wisdom they see fit." In response, the supporters of the Citizenship Clause expressly confirmed their intent to protect the children of Chinese parents by recognizing them as citizens. *See* Cong. Globe, 39th Cong., 1st Sess. 2890–92 (colloquy of Sens. Cowan and Conness) (1866); see also id. at 498 (colloquy of Sens. Trumbull and Cowan regarding the 1866 Civil Rights Bill). The legislative history of the Fourteenth Amendment provides strong confirmation that birth in the United States would suffice to confer citizenship on children of aliens of any race, as it had earlier done for children of unnaturalized European immigrants.

The legislative history also confirms that the framers of the Fourteenth Amendment intended to deny constitutionally mandated citizenship to a few categories of children, whom they regarded as not "subject to the jurisdiction" of the United States, and therefore not within the protection of the common law jus soli rule. As the Supreme Court explained in the leading case of *United States* v. *Wong Kim Ark*, 169 U.S. 649, 682 (1898):

"The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, 'All persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country."

The common law did not consider as subjects or citizens children born to aliens who did not enter the country as individuals, but rather entered under the auspices of their governments with legal or factual immunity from local law. Children born to ambassadors of foreign nations were covered by comity principles of international law that restrain the state's exercise of lawmaking power. Children born to parents accompanying an invading army, enter under extraordinary circumstances that temporarily oust the operation of local law. The example repeatedly used in the congressional debates was the children of ambassadors. See e.g., Cong. Globe, 39th Cong., 1st Sess. 2897 (1866) (remarks of Sen. Williams).

The framers of the Fourteenth Amendment also intended to deny constitutionally mandated citizenship to a category of children whose parents were neither citizens nor aliens: American Indians born within their own organized political communities. The tribes were separate, self-governing political communities whose sovereignty predated the Constitution. At the time of the adoption of the Fourteenth Amendment the federal government did not exercise legislative power directly over their members, but negotiated treaties with the tribes as sovereign powers. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2895 (1866) (remarks of Sen. Howard); see also *Elk* v. *Wilkins*, 112 U.S. 94 (1884). That is why both the original Constitution and the Fourteenth Amendment excluded "Indians not taxed"—i.e., those living under tribal governance, over whom Congress did not exercise the taxing power—from the basis of apportionment. Indians living in their tribal societies were governed by their own legal systems, like aliens who had remained at home under their own governments and diplomats, and unlike alien immigrants and visitors, who became subject to the laws of the state and federal governments upon entry. The effective legal and military independence of many tribes from state or federal governance made this notion of "domestic dependent nations" more realistic in 1866 than it subsequently became.

This history is consistent with giving the phrase "subject to the jurisdiction [of the United States]" its natural reading as actual subjection to the lawmaking power of the United States; this interpretation fulfills the framers' intentions and echoes the common law notion that children become subjects of the King by being born within his "protection." This is exactly how the Supreme Court explained the meaning of the Citizenship Clause in *United States* v. *Wong Kim Ark*.

Nothing in the language of the Citizenship Clause, its legislative history, or its traditional interpretation, requires that the parents of a child born in the United States must be permanent residents, rather than temporary visitors, for the child to be "subject to the jurisdiction" of the United States. Both the English tradition and the Supreme Court's language in *Wong Kim Ark* treat temporarily present aliens as equivalent to resident aliens for this purpose, because both are subject to

the authority of the government. See *Wong Kim Ark*, 169 U.S. at 655, 658, 674, 687, 688, 693; *Calvin's Case*, 7 Co. Rep 1b, 6a ("[F]or [the alien] owed to the King local obedience, that is, so long as he was within the King's protection; which local obedience being but momentary and uncertain is yet strong enough to make a natural subject, for if he hath issue here, that issue is a natural born subject.").

Nor is there anything in the language, legislative history, or traditional interpretation of the Citizenship Clause that would exclude children born in the United States to aliens who are not lawfully present here. Clearly, deportable aliens are subject to the jurisdiction of the United States—that is what makes them deportable, and often subject to criminal punishment as well. Their children born in the United States, though not themselves guilty of violating any law, have no immunity from the lawmaking power of the United States, and are fully subject to its jurisdiction.

The applicability of the constitutional *jus soli* rule to children of nonimmigrant aliens and illegal aliens finds confirmation in the similar interpretation of the rule by the United Kingdom and Canada. The United Kingdom followed this interpretation until 1981, when a different rule was adopted by statute,[2] and Canada still extends citizenship to all children born in the territory except the children of foreign diplomats.[3]

B. The revisionist interpretation

Everything that I have said so far has been well-established for many years. This traditional understanding has been questioned today solely because of a contrary thesis argued in a book published in 1985 by two professors at Yale University, Peter H. Schuck and Rogers M. Smith. I am sorry to be so critical of my friend Peter Schuck, but even Homer can nod, and that book's argument for a revisionist interpretation of the Fourteenth Amendment is poorly reasoned and historically inaccurate.

The book, entitled "Citizenship without Consent: Illegal Aliens in the American Polity," sets forth a theory of what it calls citizenship by mutual consent. Under this theory, citizenship in a community should depend on the consent of both the individual and the community. The book's analysis of the political philosophy of citizenship has been criticized,[4] but more important for present purposes are the fallacies in its effort to impose this philosophy on the Citizenship Clause of the Fourteenth Amendment. I pointed out these problems in a review of the book in 1987,[5] and most of these errors were also identified by Professor Joseph Carens of the University of Toronto in his book review the same year.

First, the Citizenship Clause sets forth a constitutional rule guaranteeing citizenship to a category of persons. That rule itself expresses the consent of the community, and even on the book's own theory, there should be no need to look further. Nonetheless, the authors of the book assert that the well-established traditional interpretation of the Citizenship Clause would be inappropriate under a consent-based theory, because it confers citizenship on children born to temporary visitors and illegal aliens. The authors attempt to distinguish between permanent resident aliens, on the one hand, and temporary visitors and illegal aliens, on the other, claiming that the community consents to the membership of the children of permanent resident aliens but not to the membership of children of temporary visitors or illegal aliens. This argument, however, is circular: the only evidence that the United States has consented to the membership of the children of permanent resident aliens is the same evidence that supports the traditional *jus soli* rule, which is broader.

Second, the revisionist argument requires a new interpretation of the language "subject to the jurisdiction" of the United States, in order to reconcile the theory with the language of the Citizenship Clause. The authors claim that the meaning of "jurisdiction" in the Citizenship Clause is: "a more or less complete, direct power

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[2] See J.M. Evans, Immigration Law 77–80 (2d ed. 1983); British Nationality Act 1981, ch. 61, § 1(1) (Eng.) (limiting citizenship to children of citizens and of aliens who are legally settled in the United Kingdom). Children of non-settled or illegal aliens, however, become entitled to citizenship if they remain the first ten years of their life in the United Kingdom (allowing annual absences up to 90 days). Id § 1(4).

The change in British nationality law was part of the process of the United Kingdom's disengagement from its former overseas empire and restriction of nonwhite immigration from former colonies. See Evans, supra.

[3] Citizenship Act, R.S.C., ch. C–29, ss 3(1)(a), 3(2) (1991) (Can.).

[4] See, e.g., Joseph H. Carens, Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States, 37 U. Toronto L.J. 413 (1987); David A. Martin, Membership and consent: Abstract or Organic?, 11 Yale J. Int'l L. 278 (1985); David S. Schwartz, The Amorality of Consent, 74 Cal. L. Rev. 2143 (1986).

[5] Gerald L. Neuman, "Back to Dred Scott?", 24 San Diego L. Rev. 485 (1987).

by government over the individual, and a reciprocal relationship between them at the time of birth, in which the government consented to the individual's presence *and status* and offered him complete protection." (p. 86 (emphasis added)). In other words, a person is not "subject to the jurisdiction" of the United States unless the United States consents to the person's status as a citizen. This completely circular, and so would really guarantee no one citizenship at birth. And it has no relation to any definition of "jurisdiction" that anyone else has ever proposed. This peculiar definition of "jurisdiction" should be regarded as demonstrating the impossibility of the revisionist project: there is no reasonable interpretation of the constitutional language that will accomplish the revisionists' goals.

Third, the book sometimes states that a person is "subject to the jurisdiction" of the United States only if that person owes no allegiance to any foreign country. (pp. 83, 86.) But this claim contradicts the book's own thesis that children born to permanent resident aliens are U.S. citizens. It contradicts the legislative history of the Fourteenth Amendment, which emphasized the citizenship of the children of Chinese immigrants, and it directly contradicts the Supreme Court's decision in *United States* v. *Wong Kim Ark*, which the authors otherwise attempted to preserve.

(A similar error has occurred when other proponents of a change in the citizenship laws (but not Professors Schuck and Smith, who do not make this error) have called attention to a fragment of the legislative history in which Senator Howard stated that the Citizenship Clause "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of embassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (remarks of Sen. Howard). This fragment does not support the revisionist interpretation. There are only two plausible interpretations of this fragment: either the language "foreigners, aliens, who belong to the families of embassadors" refers to a single class of "foreigners who belong to the families of embassadors," or the language includes both foreigners in general and aliens who belong to the families of embassadors. The first meaning simply confirms the traditional interpretation of the Citizenship Clause—diplomats' children are not included. The second meaning does not support the revisionist interpretation at all, but would mean that *no* children of foreigners, not even children of permanent residents, would be U.S. citizens. Only citizens' children would be citizens. This would mean that the Fourteenth Amendment had suddenly shifted U.S. citizenship law from the common law *jus soli* rule to the Continental jus sanguinis rule, and that *Wong Kim Ark* was wrongly decided. This extreme change would not only have escaped the notice of the Supreme Court; it would also have escaped the notice of the other Senators, who debated Senator Howard's proposal on the understanding that it would confirm the citizenship of children born to Chinese immigrants and Gypsies. Clearly, the first interpretation of this fragment is correct: Senator Howard was articulating the traditional interpretation of the Citizenship Clause.)

Fourth, the authors characterize their interpretation of "subject to the jurisdiction" as adding "a transforming consensual conception" to the traditional jus soli rule. (p. 85.) But the legislative history makes it very clear that the framers of the Fourteenth Amendment were not trying to adopt a transformative new conception of citizenship by consent. That was what the Supreme Court had done in the infamous Dred Scott decision, excluding African-Americans from the *jus soli* rule on the ground that whites did not consider them appropriate partners in the political community. The framers sought to overturn that innovation, and to reaffirm on a racially neutral basis the same principles that had always governed American citizenship for persons of European descent. The Supreme Court has rightly emphasized:

"As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect."
United States v. *Wong Kim Ark*, 169 U.S. 649, 676 (1898).

Fifth, the book claims that the framers of the Fourteenth Amendment could not have contemplated conferring citizenship on children of illegal aliens "for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter." (p. 95). This too is a fallacy. The federal government was not actively engaged in regulating immigration from Europe before the Civil War, but many of the states were.[6] And, more importantly, the federal government itself had been at-

[6] I have discussed antebellum state immigration law at length in the article "The Lost Century of American Immigration Law (1776–1875)," 93 Colum. L. Rev. 1833 (1993). I should add

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tempting to prohibit the international slave trade, a form of involuntary immigration. Under the revisionist theory, children born in the United States to illegally imported slaves would not have been guaranteed citizenship by the Fourteenth Amendment, because the United States government did not consent to their parents' presence in the country. This would contradict the clear purpose of the Civil Rights Act of 1886 and the Fourteenth Amendment to overturn the Dred Scott decision and to guarantee U.S. citizenship to all persons of African descent born in the United States.

Thus, for numerous reasons,[7] the revisionist argument provides no legally tenable basis for altering the traditional interpretation of the Citizenship Clause of the Fourteenth Amendment. All persons born in the United States and subject to its jurisdiction are citizens. Neither Professors Schuck and Smith nor any other revisionists have put forward any plausible interpretation of the language "subject to the jurisdiction" of the United States that would accommodate their argument. And their argument cannot be squared with the clear tenor of the legislative history.

If Congress attempts to amend the citizenship statutes without a constitutional amendment, it will be acting unconstitutionally. The courts are certain to invalidate such action and vindicate the children's citizenship just as the Supreme Court did in WONG KIM ARK. Unfortunately, however, the courts' decision will come only after a period of severe uncertainty for the government and hardship for the children affected by the legislation. It is one thing for academics to propose a speculative new theory and submit it to professional refutation, but quite another thing to experiment with the rights of U.S. citizen children.

III. REASONS WHY THE CURRENT CITIZENSHIP RULE SHOULD BE RETAINED

The current rule of broad *jus soli* citizenship has many advantages that deserve strong emphasis in evaluating the desirability of change. These include advantages for U.S. society as a whole, and advantages for all native-born citizens, as well as the advantage of protecting the children who gain citizenship by the breadth of the rule.

The realities that the *jus soli* rule addresses also deserve emphasis. Changing the citizenship rule would not remove the children of illegal alien parents from the United States. Nor would it make any substantial contribution to the enforcement of the immigration laws. Whatever the citizenship rule may be, many thousands of these children will remain in the United States, because the U.S. government will not want to expend the resources necessary to find, process and remove them and their parents. Given that so many of them will remain, the United States benefits greatly by recognizing them as citizens.

A. The social benefits of unity

One benefit that the United States derives from the breadth of its *jus soli* rule is the benefit that the Framers of that rule intended—the United States population does not include a caste of hereditary aliens. One need only compare the situation in European countries that have refused citizenship to multiple generations of foreign "guestworkers" to gain insight into the tragedies we are avoiding. Professor David Martin (now General Counsel of the INS) made this point tellingly in his review of the Schuck and Smith book:

"We have no European-style 'second generation problem' here, in part because we cannot have second generation aliens. * * * [If the children] stay here, a secure citizenship status forms a basic foundation for the shaping of identity and involvement in the polity. They are thereby encouraged to embrace life here as full participants, not as half-hearted, standoffish 'guests.' Equally important, other citizens are induced to treat them as coequal members of the polity, not as intruders who stay too long."[8]

The assimilative advantages of birthright citizenship forestall social conflict. Those who worry about the "disuniting" of America should be the last to favor the creation of a hereditary caste of alien residents.

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that, although lawyers have often succumbed to the myth that there was no immigration law before the Civil War, professional historians have been aware that such law did exist.

[7] I will not devote space here to another historical error in the book the misinterpretation of the 18th Century Swiss author Jean Jacques Burlamaqui. This error provides another weak link in the book's argument, but explaining its significance would unduly trespass on the Committee's time.

[8] Martin, supra note 4, at 283–84.

B. The advantages to other native-born citizens

The bright-line character of the *jus soli* rule protects all persons born in the United States, including the children of U.S. citizens. At present, proof of citizenship reduces to proof of place of birth, a fact that a genuine birth certificate can reliably evidence. Adults who were born in the United States do not find themselves called upon to demonstrate the immigration status of their parents at the time of their birth, or of their grandparents at the time of their parents' birth. Such genealogical inquiries would become routinely necessary if the *jus soli* rule were modified, as they are necessary in countries that base citizenship on descent.

The substitute rules proposed in the bills and joint resolutions vary in the complexity of their criteria for citizenship. Under some versions, both the immigration status and the place of residence of the parents matter. Under some versions, any lawful status of the parents suffices, while under others, only particular lawful statuses suffice. H.J. Res. 93 adds conditions concerning the time of the parents' entry.

It is difficult to imagine how such determinations could be made reliably by hospital personnel at the time of birth. Even if supporting documents were always available, deciding from a complex fact situation whether an alien was in lawful status on a given day can become an extraordinarily difficult undertaking. In fact, presumably such contemporaneous determinations would not be conclusive, and citizens might find their citizenship challenged because of defective government records decades after memories had faded and witnesses had died.

Perhaps these problems could be handled by establishing a centralized nationwide registry of personal status and a national identity card. The United States has traditionally avoided such a system, associating it with police state.

C. The benefits of protecting the children of illegal aliens

Currently, the children born to illegal parents in the United States become citizens at birth. This citizenship does not prevent the punishment or deportation of their parents, but it insulates the children from some of the dangers of illegal status. Since the children cannot help being born here, and are obviously not to blame for their parents' transgressions, this insulation is highly appropriate. At a minimum, the children should not be denied citizenship without being given compensating protections for their human rights.

The present proposals are therefore incomplete. They deny the children the status of citizenship, but they establish no compensating protection for the children.[9]

Turning innocent children into hereditary illegal aliens would blight their lives severely. As the courts have recognized, illegal aliens '"are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them.'" *Plyler* v. *Doe*, 457 U.S. 202, 219 n.18 (1982) (quoting *Doe* v. *Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)). The continuous threat of deportation inhibits illegal aliens from seeking the protection of the law, that is, of course, a major part of their attraction for unscrupulous employers.[10] Nor is the law generous in compensating for their vulnerability. The current trend is toward broad disqualification of illegal aliens from benefits and services available to the general populace. States may not have the power to do this without federal authorization, but the courts are likely to defer to nearly any disqualification that Congress should choose to enact. Although the Supreme Court prevented Texas from excluding illegal alien children from its schools in *Plyler*, even there it suggested that it would have applied a different standard of review if Congress had authorized the exclusion. 457 U.S. at 225–26. California's Proposition 187 attempts (thus far, unsuccessfully) to bar illegal alien children from education, health care, and even from state intervention to protect them from child abuse.

Whatever the vagaries of future legislation, the Citizenship Clause guarantees that native-born children will not suffer such comprehensive deprivation on account of their parentage. Nor can such disabilities become heredity. As their discussion

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[9] In fact, the proposals are radically incomplete in another sense: having withdrawn one status, they do not specify what the children's status will be instead. I assume that most proponents of change contemplate that the children of illegal aliens will also be illegal aliens, and deportable as such. This would not necessarily follow from the current proposals. There is no deportation ground in the current statute that covers the case of persons born as aliens in the United States, because they have never entered and have broken no laws. For this reason, children born in the United States to foreign diplomats are considered lawful permanent residents. See Nikoi v. Attorney General, 939 F.2d 1065 (D.C. Cir. 1991); Matter of Huang, 11 I. & N. Dec. 190 (Reg. Comm. 1965).

[10] See Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law, 1988 Wis. L. Rev. 955, 992–97, 1003–04.

of the Chinese on the West Coast demonstrates, the Framers of the Fourteenth Amendment perceived that avoidance of such harms was an issue of constitutional dimension, which should not be dependent on temporary shifts in public opinion.

Finally, mention should also be made of a special category of children: those who would otherwise be stateless. Another benefit of the Citizenship Clause has been that no children are born stateless in the United States. No special provision has been needed to accomplish this.[11] If the *jus soli* rule were modified, then children born to stateless parents, or children born to parents whose nationality would not descend to them under foreign law, would have no country of their own. Provision would have to be made to avoid this consequence.[12]

D. The benefits of protecting children of temporarily admitted aliens

Some of the proposals would limit U.S. citizenship to children of citizens and "legal residents," and some others would limit U.S. citizenship to children of citizens and "permanent residents aliens." The elimination of citizenship for children of other lawfully present aliens therefore requires brief attention.

H.R. 1363, which limits citizenship to the children of "permanent resident aliens," illustrates the problem. Permanent resident aliens are only one category of the aliens who are permitted to reside in the United States indefinitely. Lawful alien residents also include asylees, parolees, aliens whose deportation has been withheld, or other recipients of discretionary relief. This formula would permit Congress to determine the citizenship status of an alien resident's descendants by controlling the alien's status label. It therefore possesses enormous potential for the creation of categories of hereditary alien inhabitants.

The alternative formula, "legal resident," might or might not create the same problem, depending on how it would be interpreted. For example, under a temporary workers' program that authorized alien workers to remain in the United States in renewable one-year increments, one might conclude that the workers were not "residents." Such a program could replicate the guestworker system that has caused such a dilemma in Europe.

Moreover, it is difficult to see why granting citizenship to children of temporarily admitted aliens should be a subject of controversy. Professors Schuck and Smith objected to these citizens, but wholly on theoretical grounds, and their theory has been sharply criticized. During the period of the parents' lawful presence, the children would be permitted to remain anyway, and the citizenship of the children creates no substantial obstacle to removal of the parents when that period expires. There is simply no social problem here justifying a constitutional amendment.

IV. FURTHER PROBLEMS RAISED BY PROPOSALS TO AMEND THE CITIZENSHIP CLAUSE

Aside from the merit of the existing citizenship rules, the current proposals raise a number of problems of constitutional dimension. Some of these problems are specific to particular proposals, while others are common to all the proposals.

A. Sex discrimination

Some of the proposals for new citizenship rules (H.R. 705, H.R. 1363, H.J. Res. 64) discriminate on grounds of sex, by making the citizenship of the child turn on the status of the child's mother only. H.J. Res. 64 would actually write sex discrimination into the Constitution itself. Children born in the United States would only be U.S. citizens if their mothers were "citizens or legal residents." This would be objectionable in itself, and could have unforeseen consequences for constitutional interpretation generally.

The Constitution is now essentially gender-neutral. There is an obsolete provision in section 2 of the Fourteenth Amendment that reduced the representation of states that disenfranchised male voters, thereby implying the propriety of disenfranchising female voters. This implication has been superseded by the Nineteenth Amendment. It would be highly offensive to write gender discrimination into section 1 of the Fourteenth Amendment.

The lower courts have held that the pre-1934 *jus sanguinis* rule, under which children born to U.S. citizen parents outside the United States were U.S. citizens only if their fathers were U.S. citizens, denied the equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment. See, e.g., *Wauchope* v. *U.S. Dep't of State*, 985 F.2d 1407 (9th Cir. 1933); *Elias* v. *U.S. Dep't of State*, 721 F.Supp. 243 (N.D.Cal. 1989); cf. Pub. L. No. 103–416, § 101(a), 108 Stat. 4306 (pro-

[11] But see 8 U.S.C. § 1401(f) (presuming that children of unknown parentage found in the U.S. before age five were born in the U.S., in order to avoid statelessness).

[12] The United States is internationally committed to respect the right of every child to acquire a nationality, under Article 24(3) of the International Covenant on Civil and Political Rights.

viding a remedy for most such cases). H.J. Res. 64 would apply similar discrimination to children born within the United States, which is an even more egregious denial of equality. As a later constitutional amendment, however, it would take legal precedence over the equality guarantee of the Fifth Amendment.

The constitutional enshrinement of sex discrimination in citizenship law would legitimate sex discrimination in a manner that might not be confined to the area of citizenship. Constitutional interpretation proceeds by the inference of general principles from the entire Constitution as well as by the narrow reading of specific provisions. The proposed amendment might affect case law concerning the equal treatment of fathers in other contexts, or sex discrimination more generally. In the long term, such consequences of constitutional amendments are difficult to predict.

Moreover, the sex-discriminatory proposals exhibits disturbing inattention to the realities of female immigration. Congress has previously displayed its awareness of these realities, enacting several modifications of the immigration laws in recent years to address problems of spousal abuse. See, e.g., Pub. L. No. 103–322, § 40701–40703, 108 Stat. 1953–55 (1994). A substantial number of undocumented women are deliberately kept undocumented by their citizen or lawful resident alien husbands as a means of control. See Janet M. Calvo, Spouse-Based Immigration Laws: The Legacies of Coverture, 28 San Diego L. Rev. 593 (1991). By specifically denying citizenship to children born in such marriages, H.J. Res. 64 would only increase the opportunity for abuse.

B. Consequences of U.S. citizenship

Some of the proposals would repeal the Citizenship Clause or remove it from the Fourteenth Amendment. These proposals may have unintended consequences for the rights of U.S. citizens generally, and may increase their vulnerability to involuntary expatriation.

At present, the Citizenship Clause appears at the first sentence of the Fourteenth Amendment, and prefaces a declaration of rights, including the prohibition against a State's abridging the privileges or immunities of citizenship. The Citizenship Clause is currently interpreted by the Supreme Court not only as defining who shall receive citizenship, but providing some of the content of citizenship. In *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), Justice Hugo Black discussed the history of the adoption of the Fourteenth Amendment as demonstrating that the citizenship that it guaranteed was not "a fleeting citizenship" but a permanent one, beyond the power of Congress to cancel by involuntary expatriation. This important right to the permanence of citizenship, which the constitutions of some other countries set forth explicitly, is deducted in the United States from the structure and history of the Fourteenth Amendment.

Dismantling the Fourteenth Amendment may endanger the basis of this protection. If the Citizenship Clause is repealed and replaced by a separate article, then the legislative history of the Fourteenth Amendment will no longer be controlling, and the structural connection between the Citizenship Clause and other rights protections will be broken. The language and history of the new article may create a new starting point for interpretation. The Congress should exercise great care that essential rights of all U.S. citizens are not sacrificed in the process.

C. Threat to other constitutional values

Section One of the Fourteenth Amendment is one of the central texts of the United States Constitution. It contains the Citizenship Clause, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. The adoption of this Amendment has been called a second American Revolution that perfected the first American Revolution, by rejecting the legacy of slavery and racial inequality.

The Citizenship Clause, which overturned the Dred Scott decision, was an integral part of that process. It redefined the national identity of the United States as ethnically inclusive. One could no longer say that the United States was a "white man's country." Unlike in ethnically defined nations, U.S. citizenship is not a matter of who your parents were. Being born in this land of freedom is enough.

Amending the Citizenship Clause would doubly attack that legacy. First, it would set a precedent for the diminution of Fourteenth Amendment rights. The Congress has observed a healthy inhibition against making amendments that cut back on the original Bill of Rights, and a parallel hesitancy to cut back on the Fourteenth Amendment is justified.

Second, amending the Citizenship Clause would amount to another redefinition of the American national identity. Descent would receive new prominence; openness and equality would be deemphasized. These proposals are not merely technical changes to facilitate the enforcement of the immigration laws. They stake out controversial positions on American national identity. It is no coincidence, for example,

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that H.J. Res. 87 couples a change in the birthright citizenship rule with a constitutional requirement of English proficiency for naturalization. These positions should be openly admitted and openly debated.

Perhaps the time has come for the United States to be like other nation-states. I hope not, particularly in a decade when ethnic nationalism is resurgent globally. But if so, it should be done with a frank recognition of what we are giving up.

V. CONCLUSION

The purpose of this testimony is two-fold. First, it provides a legal analysis of congressional power over citizenship in the absence of a constitutional amendment. Congress has no power to enact the current proposals as ordinary legislation.

Second, this testimony attempts to identify some of the problems raised by the proposals for constitutional amendments. There is strong reason to believe that the minor gains sought by the proponents of these amendments are outweighed by severe disadvantages.

Mr. CANADY. Thank you, Professor Neuman. Professor Erler.

STATEMENT OF PROF. EDWARD J. ERLER, POLITICAL SCIENCE, CALIFORNIA STATE UNIVERSITY, SAN BERNARDINO, AND SENIOR FELLOW, CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY

Mr. ERLER. Thank you, Mr. Chairman. I believe that Congress has the power under the Constitution to define by statute those persons who are within or subject to the jurisdiction of the United States. I believe Congress has in fact exercised that power on various occasions. So the proposal to deny birthright citizenship to the children of illegal aliens would not be a new exercise of power on the part of Congress.

Let me just start with the plain language of section 1 of the 14th amendment. "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens." There are two requirements here. You must be born in the United States, but you also must be subject to the jurisdiction of the United States. If we assume that all persons who are born in the United States are automatically subject to the jurisdiction of the United States, you have rendered the jurisdiction clause superfluous.

I believe it is a principle of constitutional construction that you cannot interpret the Constitution in any way that renders any clause superfluous or without force or effect. This would be tantamount to amending the Constitution.

I also believe that the intentions of the Framers of the 14th amendment are quite clear. Senator Lyman Trumbull, who was chairman of the Senate Judiciary Committee, said what he believed it meant to be within the jurisdiction of the United States or subject to the jurisdiction of the United States. He said it meant "not owing allegiance to anybody else. It is only those persons who come completely within our jurisdiction who are subject to our laws that we think of making citizens, and there can be no objection to the proposition that such persons should be citizens."

This of course was familiar language. It had already been used in the Civil Rights Act of 1866, which had defined citizens of the United States as all persons born in the United States and not subject to any foreign power. So this idea that there was allegiance necessary to be subject to the jurisdiction of the United States was a familiar one. It was not all persons born into the United States,

but all persons born in the United States owning allegiance to the United States. I think this is an important distinction.

Also, Senator Jacob Howard, who was the author of the citizenship clause made a remark that should be decisive in this consideration. It is a remark that Chairman Smith quoted earlier, but bears repeating. He said that "every person born within the limits of the United States and subject to their jurisdiction is by virtue of natural law and national law a citizen of the United States. This will not, he said, of course include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States. So clearly, the author of the citizenship clause intended to count children born in the United States to foreigners, aliens and ambassadors of foreign ministers as outside the jurisdiction of the United States, because owing no allegiance to the United States."

Now one other thing. That is, there was a debate at the time of the proposing of the 14th amendment about whether or not the first section of the 14th amendment would include Indians as citizens of the United States. Everyone agreed that it would not, that Indians would not become citizens of the United States by virtue of the passage of the 14th amendment because they were not subject to the jurisdiction of the United States. Members of Indian tribes owed allegiance to their tribes, and therefore, didn't owe allegiance to the United States.

In 1870, the Senate Judiciary Committee published a report that addressed this question of whether the 14th amendment had made Indians citizens. The report's emphatic conclusion was that it had not, and that Indians were not citizens or made citizens because they were not subject to the jurisdiction of the United States. This seems to be clear and everyone seems to have agreed on this point.

What happened, however, was that various pieces of legislation passed by Congress extended the jurisdiction of the United States to various Indian tribes beginning in 1870 and thereafter. Several pieces of legislation were passed inviting members of various Indian tribes to become citizens of the United States, and in effect, extended the jurisdiction of the United States to those tribes. In 1924 of course, there was general legislation passed that brought all Indians born in the United States within the jurisdiction of the United States.

The idea here is that citizenship is based upon consent, not just the consent of the community or the consent of the Government, but reciprocal consent. No person can become a citizen of the United States without his consent, nor can any person become a citizen of the United States without the consent of the nation.

I think just one last point. It seems to me that there is positive proof that the Framers of the 14th amendment did not adopt birthright citizenship when they passed the 14th amendment. This is the fact that they also in 1868, the same year that the amendment was ratified, passed an expatriation law which allowed any citizen of the United States to renounce his citizenship and put himself outside the jurisdiction of the United States. Under any notion of birthright citizenship, that would be impossible, because once you

incur obligations to the sovereign under birthright citizenship, you owe fealty or allegiance forever. Thank you.

[The prepared statement of Mr. Erler follows:]

PREPARED STATEMENT OF PROF. EDWARD J. ERLER, POLITICAL SCIENCE, CALIFORNIA STATE UNIVERSITY, SAN BERNARDINO, AND SENIOR FELLOW, CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY

The evidence is incontrovertible that not all persons born in the United States are within the jurisdiction of the United States and that Congress under section five of the Fourteenth Amendment has the power to define the jurisdiction of the United States. It is my considered opinion that the "Citizenship Reform Act of 1995" is a proper exercise of Congressional power.

The immediate purpose of the citizenship clause of the Fourteenth Amendment was to overturn the infamous *Dred Scott* decision of 1857 which had proclaimed all blacks of African descent to be ineligible for citizenship. The fatal defect in the reasoning of *Dred Scott* was its denial that blacks of African descent were included in the founding principle of the Declaration of Independence that "all men are created equal." It is the principle of equality that makes the consent of the governed the necessary foundation of legitimate government. Without consent, rule is based merely on force. But of course slavery is based on force rather than consent—hence its illegitimacy and its injustice. Consent—the reciprocal consent of the social contract—is also the necessary foundation of citizenship. Prior to the Fourteenth Amendment, Federal citizenship was an incident of State citizenship; every citizen of a State was, by virtue of that citizenship, automatically a citizen of the United States. The Fourteenth Amendment reversed that relationship and reconfirmed the consensual basis for citizenship that had been read out of the Constitution by the *Dred Scott* decision.

There seems to be agreement on all sides that the principal object for the Fourteenth Amendment was to secure Federal citizenship for the newly freed slaves and extend to them the whole panoply of civil rights that are the necessary incidents of Federal citizenship. In order to forestall attacks upon the citizenship of former slaves, the framers of the Fourteenth Amendment made Federal citizenship primary and State citizenship derivative, so that any person who saw a citizen of the United States was automatically a citizen of the State wherein he resided. This made it impossible for the State to circumvent Federal protection for civil rights by withholding State citizenship from the former slaves and thus preventing them from becoming citizens of the United States.

Even though it is clear that the Fourteenth Amendment was passed principally to settle the question of the citizenship of the newly freed slaves, today the phrase "All persons born or naturalized in the United States" is almost universally understood to confer citizenship upon all persons who are born in the United States regardless of whether they are legally in the country or not. But being born in the United States only compromises one part of the two part requirement of citizenship. The second part requires that a person born in the United States must also be "subject to the jurisdiction" of the United States.

What is the meaning of this subordinate clause in the first sentence of the Fourteenth Amendment? It is clear that, whatever else it means, the phrase was intended to limit or qualify "All persons born or naturalized * * *" Only those persons "born or naturalized" and "subject to the jurisdiction" of the United States are citizens of the United States. Thus, the phrase clearly does not have universal application. To assume, as many today do, that all persons born in the United States are automatically subject to the jurisdiction of the United States by virtue of their birth would render the jurisdiction clause superfluous. But no interpretation can render any part of the Constitution superfluous or leave any provision without force. This is a necessary consequence of a written constitution. Any interpretation that rendered a provision of the Constitution superfluous would be tantamount to an amendment of the Constitution itself.

The legislative debates decisively demonstrate that both clauses of the first section of the Fourteenth Amendment were intended to have independent force. The first definition of citizen to make its appearance in the Fourteenth Amendment was put forward by Senator Benjamin F. Wade on May 23, 1866. It simply included "all persons born in the United States or naturalized by the laws thereof."[1] Senator Jacob Howard offered a substitute which added the jurisdiction clause: "All persons born in the United States and subject to the jurisdiction thereof are citizens of the

[1] Congressional Globe, 39th Cong., 1st Sess., 2769 (May 23, 1866).

United States and of the States wherein they reside."[2] This substitute was inspired, in part, by the objection made by Senator William Fessenden that Wade's definition would have included as citizens children born to diplomats residing in the United States. Howard later inserted "or naturalized" after "born," bringing the clause to its final form.[3] It is thus beyond cavil that the jurisdiction clause was meant to be a limitation on "all persons."

Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee and a powerful supporter of the Fourteenth Amendment, remarked on May 30, 1866, that the jurisdiction clause refers to those "Not owing allegiance to anybody else * * * it is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens."[4]

This, of course, was familiar language. The Civil Rights Act of 1866 had defined citizens of the United States as "all persons born in the United States, and not subject to any foreign power excluding Indians not taxed." It is universally agreed that the immediate impulse for the passage of the Fourteenth Amendment was to constitutionalize the Civil Rights Act of 1866. This was an attempt to put the question of citizenship and matters of Federal civil rights beyond the reach of simple congressional majorities. Thus it is clear that the idea of allegiance ("not subject to any foreign power") was somehow central to understanding the jurisdiction clause of the Fourteenth Amendment.

Senator Jacob Howard, the author of the citizenship clause, made the most precise statement about the character of the limitation contained in the jurisdiction clause:

"[E]very person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country."[5]

Clearly, the author of the citizenship clause intended to count children born in the United States to "foreigners," "aliens," and "ambassadors or foreign ministers" as outside the "jurisdiction of the United States."

But perhaps just as revealing is the fact that Howard refers both to "natural law" and "national law." As Howard surely knew, citizenship based on natural law meant that no person could be governed—or become a citizen—without his consent. This was the natural law principle of the Declaration of Independence that proclaimed that legitimate governments derive "their just powers from the consent of the governed." As Thaddeus Stevens, a leading Radical Republican and member of the Joint Committee on Reconstruction, remarked before the House on May 8, 1866, remarked:

"Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now."[6]

It is certainly true that just or legitimate government requires the unanimous consent of each and every individual who is to be governed whether that consent is given explicitly or tacitly. The foundation of community based on the consent of the governed is the social contract. The common understanding of these foundations during the founding era was expressed in the Massachusetts Bill of Rights (1780):

"The end of the Institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights * * * and whenever these great objects are not obtained, the people have a right to alter the government. * * * The body-politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in fram-

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[2] Id., at 2869 (May 29, 1866).
[3] Id., at 3040 (June 8, 1866).
[4] Id., at 2893 (May 30, 1866).
[5] Id., at 2890, See *Slaughter-House* cases, 83 U.S. 36, 73 (1873) where Justice Samuel Miller, writing for the majority, noted that "[t]he phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States."
[6] Id., at 2459.

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ing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them."

Thus, the social contract requires reciprocal consent. Not only must the individual consent to be governed, but he must also be accepted by the community as a whole. If all persons born within the geographical limits of the United States are to be counted citizens—even those whose parents are in the United States illegally—then this would be tantamount to the conferral of citizenship without the consent of "the whole people."

But if the natural law requirements of citizenship mean anything, it must surely mean that consent must be reciprocal—allegiance on the part of those who seek to become citizens and the consent of the nation. Any contract requires at least two parties; there can be no contract that binds someone who has not been party to the contract. Any reasonable person would have to agree that "subject to the jurisdiction of the United States" means those who are within the geographical limits of the country legally—that is with the permission of the United States. Indeed, on at least one occasion the Supreme Court rightly noted that the jurisdiction requirement of the Fourteenth Amendment embodied "the principle that no one can become a citizen of a nation without its consent."[7] The jurisdiction clause of the Fourteenth Amendment, as Howard noted, is truly the "national law" confirming or codifying the "natural law."

Much of the debate about the jurisdiction clause in the Congress centered on the status of Indians. The immediate question was whether the Fourteenth Amendment would confer citizenship upon the Indians as well as upon the newly freed slaves. The former slaves, of course, had been born in the United States and had always been subject to its jurisdiction. Was the same true of Indians? Indians were surely born in the United States, but were they subject to its jurisdiction in the sense of "[n]ot owing allegiance to anybody else?" Senator Trumbull noted that "[t]he provision * * * that 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens' * * * means subject to the complete jurisdiction thereof." Trumbull proceeded to deny that Indians were "in any sense subject to the complete jurisdiction of the United States. * * * We make treaties with them, and therefore they are not subject to our jurisdiction. * * * It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States'."[8] The author of the citizenship clause, Senator Howard, emphatically agreed with Trumbull's assessment that Indians would not become citizens of the United States as a result of the passage of the Fourteenth Amendment.

"The word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now. Certainly, gentlemen cannot contend that an Indian belonging to a tribe although born within the limits of a State, is subject to this full and complete jurisdiction."[9]

Clearly, insofar as Indians owed tribal allegiance they were not within jurisdiction of the United States, even though there were born within its territorial limits and in many instances subject to its laws. It is important to note here that jurisdiction does not mean simply subject to the laws of the United States. Rather, it refers specifically to "political jurisdiction" in the sense of allegiance. Aliens in the United States are properly subject to the laws of the United States and the jurisdiction of its courts; but this is not the same as owning allegiance to the United States. Aliens subject to the laws of the United States still owe allegiance to another country and are thus not within the political jurisdiction of the United States—the only jurisdiction contemplated by the Fourteenth Amendment.

In 1870, the Senate directed the Judiciary Committee to "report to the Senate the effect of the fourteenth amendment to the Constitution upon the Indian tribes of the country; and whether by the provisions thereof the Indians are not citizens of the United States." The Committee report noted that "[t]he inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. The Report's conclusion was unequivocal: "those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legis-

[7] *Elk* v. *Wilkins*, 112 U.S. 94, 103 (1884).
[8] Congressional Globe, 39th Cong., 1st Sess., 2893 (1866).
[9] Id., at 2895.

latures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, "and subject to the jurisdiction," and that such has been the universal understanding of all our public men since the amendment became a part of the Constitution.[10]

Thus, it seems to be beyond doubt that the jurisdiction clause of the fourteenth amendment was intended by its framers to have independent force; not all persons born in the geographical limits of the United States are within the jurisdiction of the United States. To be within the jurisdiction of the United States means to be within its political jurisdiction.

As the Supreme Court said in *Elk* v. *Wilkins* (1884), "[t]he evident meaning of [the jurisdiction clause] is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely, subject to their political jurisdiction and owing them direct and immediate allegiance * * * Indians, born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian Tribes, an alien though dependent power, although in a geographical sense born in the United States, are no more born in the United States and subject to the jurisdiction thereof * * * than the children of subjects of any foreign government born within the domain of that government; or the children, born within the United States, of ambassadors or other public ministers of foreign Nations."[11] In this case, Elk had renounced his tribal allegiance and had lived for some years apart from the tribe. But the Court was adamant that the ascription of citizenship could not be a unilateral or self-selected act. "The alien and dependent condition of the members of the Indian Tribes could not be put off at their own will, without the action or assent of the United States" signified either by treaty or legislation.[12] Neither "the Indian Tribes" nor "Individual members of those Tribes," no more than "other foreigners" can "become citizens of their own will."[13] It must be emphasized that no individual can be made a citizen against his will or, that is, without his consent. Yet, self-selected citizenship is not enough; it must be ratified by those who are already members of the political community.

The Court in *Elk* noted that several congressional acts had been passed subsequent to the Fourteenth Amendment to bring various tribes within the jurisdiction of the United States, acts "which would have been superfluous if they were or might become, without any action of the government, citizens of the United States."[14] In this regard, the Court mentions the "Act of July 15, 1870," extending the jurisdiction of the United States to any member of the Winnebago tribe who desired to become a citizen. A similar act was passed on March 3, 1873, extending jurisdiction to members of the Miami Tribe of Kansas. Indeed, this was the method used by Congress—exercising its section 5 powers to enforce the provisions of the Fourteenth Amendment—to bring various members of Indian tribes within the jurisdiction of the United States. General legislation was passed, of course, in the Indian Citizenship Act of 1924 which provided that "all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States."[15] Thus, Congress has a long history of exercising its Section 5 powers to define who falls within the jurisdiction of the United States. The "Citizenship Reform Act of 1995" is precisely the same exercise of congressional power.

Allowing children of illegal aliens to become citizens at birth permits the creation of citizens without the permission of the nation. It is the same notion of self-selected citizenship that was always disallowed in the case of Native Americans. A sovereign nation must, at a minimum, have plenary power to determine who will become citizens. In the absence of automatic citizenship for children born to illegal aliens, their citizenship would follow the citizenship of their parents—or be determined by the laws of the country in which the parents hold citizenship. The fact that illegal aliens have violated laws of the United States precludes any possibility that they can be properly said to be within the jurisdiction of the United States as the aliens surely have demonstrated that they do not believe themselves to be subject to the laws of the United States, or only partially subject. It would, of course, be a different matter for the children born of legal aliens who have been admitted by the laws of the United States. Whether their children would be citizens at birth or upon the attainment of citizenship of the parents would be a matter for Congress to determine. There has never been a Supreme Court opinion holding that the children of illegal aliens

[10] Senate Report No. 268, 41st Cong., 3rd Sess. (1870), at 10.
[11] *Elk* v. *Wilkins*, at 102.
[12] Id., at 99.
[13] Id., at 101.
[14] Id., at 104.
[15] "Documents of United States Indian Policy," 2nd ed. revised, Frances Paul Prucha, ed. (Lincoln: University of Nebraska Press, 1990), at 218.

are entitled to American citizenship by virtue of their birth within the geographical limits of the United States. In the case of *United States* v. *Wong Kim Ark* (169 U.S. 649 [1898]), the Court held that a child of legal aliens—even though they were rendered ineligible for citizenship by both statutes and treaty and maintained allegiance to their country of birth—was a citizen. The "Citizenship Reform Act of 1995" would not trench upon this decision in any way. There are no case law precedents that indicate in any manner that this act would violate the Constitution or is beyond the powers of Congress.

No constitutional amendment is required to deny automatic citizenship to children of illegal aliens. Indeed, statutory solutions are always preferable to constitutional amendment simply because the organic law of the nation should be changed as little as possible and only for the most grave and compelling reasons. Since Congress has plenary power "to establish an uniform Rule of Naturalization" and to determine who is "within the jurisdiction of the United States," no constitutional amendment is needed or desirable.

The argument for birth-right citizenship is, of course, more suitable to feudalism than it is to republicanism or democracy. Under the feudal concept of citizenship, anyone born under the protection of the sovereign owed perpetual allegiance or fealty to the sovereign. It is hardly credible that the framers of the American Constitution or the framers of the Fourteenth Amendment would have contemplated a basis for citizenship that had its origins in the feudal regime. Indeed, the great object of the American Revolution was to replace the feudal regime with one based on "the consent of the governed." In basing citizenship on the consent of the governed, the framers of the Constitution placed the rights and obligations of citizenship on an entirely new—and democratic—basis. Indeed, the consensual basis for citizenship, so far from creating a permanent and indissoluble allegiance to the sovereign, maintains the general right of expatriation. The Reconstruction Congress understood the necessity of reciprocal consent in establishing citizenship when it passed the Expatriation Act of 1868—an Act contemporaneous with the ratification of the Fourteenth Amendment—which proclaimed the natural and inherent right of individuals to withdraw from the country of their birth. This Act conclusively demonstrates that the notion of citizenship that informed the Reconstruction Congress was not birth-right citizenship.[16] Birth-right citizenship does not allow for expatriation; under birth-right citizenship the obligations created by the accidents of birth are indissoluble. It is unimaginable that the framers of the Fourteenth Amendment, who looked upon their handiwork as a great act of liberation for the newly freed slaves, could have intended to resurrect the feudal notion of birth-right citizenship in the citizenship clause of the Fourteenth Amendment.

Mr. CANADY. Thank you, Professor. Ms. Jauregui Alcantar.

STATEMENT OF EMILY JAUREGUI ALCANTAR, FORMER REPORTER, EL PASO TIMES

Ms. JAUREGUI ALCANTAR. My name is Emily Jauregui Alcantar. I am a former reporter with the El Paso Times. Let me start by telling you that this was one of the most difficult stories that I had to write in my 7 years as a reporter. That is to say something, because I covered some big ones, including the war in Chiapas, Mexico. The reason that it was so difficult was because I wrote this story while I was 8 months pregnant with my second child. It involved illegal immigration of Mexican women. I am a first generation American of Mexican descent. My parents are immigrants to this country from Mexico. What I found was very disturbing.

Basically, what happened was when I was eight months pregnant I was in Juarez, Mexico, which is our sister city. I am from El Paso, TX, and Juarez, Mexico, is our sister city. They are very close together. They touch each other divided only by the Rio Grande and the international bridges. When I was in Juarez doing another story, I came upon this story of illegal immigration and Mexican women having children in the United States.

[16] See Congressional Globe, 39th Cong. 1st Sess, at 2969.

Basically, as I was on the bridge, I started getting offers from Mexican nationals who called themselves coyotes, or people smugglers, to cross me illegally into the United States and deliver me to the county hospital so I could have my child as an American citizen and be able to tap into the U.S. welfare system. I was intrigued by what I was being told, so I went back to the newsroom and I told of my experiences to the editors. After some convincing, we decided that I would go undercover and pursue the story and see what would happen. We were going to research and see if it was true that a Mexican national could secure benefits without any type of identification and have an American baby.

So I went back to the bridge and I pretended to be a Mexican national. It was very easy for me to do since I'm a first generation American, my Spanish is very good. I discovered that it took as little as $3 to be waded across the river on a raft. From there, it would take $20 to be delivered to the hospital. Once I arrived at the county hospital, they didn't require any type of identification. I got help from the other Mexican women who were there to deliver babies. They basically told me that all I needed was a notarized letter from someone attesting to the fact that I lived in their home. This was very easy to do because I write under my maiden name, so my husband wrote a letter saying that I lived in his home, and I cooked and cleaned, which was technically correct. [Laughter.]

That's how we were able to do it. Once I got to the hospital, it took as little as 15 minutes to register to have my baby. I was never asked if I was a U.S. citizen. I could have had my baby, which cost about $1,700, for free.

What was amazing to me was that I got all the information from the women at the hospital. I didn't come across a single one who was a legal resident, well, one was here legally now, but she first came to the United States as an illegal immigrant. But all of the women who were at the El Paso County Hospital were from Mexico.

What was shocking is that most of them were not there illegally. They didn't go, like I did, across the river illegally to have their babies. They used their shopping visas to enter the country, because with these shopping visas, you can enter the United States for 72 hours. So what they do is they come across as though they were shopping. Instead they would go to their doctor's appointment at the county hospital. Then when it was getting close to their due date they come to El Paso, see El Paso and Juarez are so close that you have family in Juarez and in El Paso. So the week they were due, they would go to their family in El Paso. They would stay there a week. When it was time to give birth, they would go the hospital and have their baby. From there, they used the same address to secure the welfare benefits. That's basically where the checks go. But a lot of these women live in Mexico. They live in Juarez. They don't live in El Paso. So once a month, they go and they pick up their benefits. They go back to Juarez to their home and they buy groceries and things of this nature.

Like I said, this is such a difficult story for me to write because prior to this story I never understood the issue. Being a first generation American, because my parents have never had welfare benefits and they were very hard working, I always thought, what's

the big deal? You know, why are Hispanics—in El Paso, about 70 percent of the population is Hispanic—so divided. This issue has divided us. A lot of Hispanics feel that we should close the borders and not let anybody else in, now that we're here. Then one-third of the Hispanics feel no, no. It's not right. We shouldn't have borders. Anybody should be able to make it wherever they want to make it. Then the other third feel kind of like in between, you know, we should allow immigrants but we shouldn't allow them access to welfare, the first generation or so.

I think that's basically where I stand, because after what I saw, I realized that it's the welfare benefits that are costing such a bad anti-immigrant sentiment, in my opinion. Because I feel that a lot of people feel that immigrants just want to come here for the benefits. I don't think that's right. I got a lot of bad comments from my fellow Hispanics when I wrote the story, but I think people should know that this is huge. This is bigger than people realize, unless you live on the border, some of the abuses that are going on as far as welfare are hard to understand.

[The prepared statement of Ms. Jauregui Alcantar follows:]

PREPARED STATEMENT OF EMILY JAUREGUI ALCANTAR, FORMER REPORTER, EL PASO TIMES

My name is Emily Jauregui Alcantar. I am 31 years old, a resident of El Paso, Texas—near the U.S./Mexico border.

What I am about to testify to is information that I discovered as a reporter for the El Paso Times newspaper, when in 1993 I posed as an illegal immigrant from Mexico to document how easy it was to secure welfare benefits from the United States.

Although my experience centers around the U.S.-Mexico border area of El Paso, it is my understanding that illegal immigrants from countries all over the world are tapping into the U.S. welfare system. As a result, many Americans are debating whether it is a good idea to continue the policy of automatic citizenship for any person born on U.S. soil.

For years, Americans have complained about the high cost of providing benefits to illegal immigrants. Complaints are common along the El Paso border, where residents get a closer glimpse of some of the tax-related abuses that can occur.

Personally, I never understood the issue until I went undercover for my story. I didn't really have much of an opinion about the issue.

To understand my report, you must be familiar with the border area of El Paso, Texas and Juarez, Chihuahua, Mexico.

El Paso and Juarez are true sister cities. The cities are separated only by the Rio Grande and a couple of international bridges.

In June of 1993, while eight months pregnant, I was across the border in Juarez, Mexico working on a project when I stumbled on a story about the U.S. welfare system and illegal immigration.

Much of my story was based on the simplicity of entering the United States illegally to have my baby free of charge in the United States. Since my story, it's no longer so easy to enter the United States because of "Operation Hold the Line," which was initiated by the U.S. Border Patrol in the El Paso area. Under "Operation Hold the Line," agents now concentrate efforts on guarding the border. Prior to this new policy, border patrol agents were scattered throughout the city of El Paso, often apprehending illegal immigrants after they were inside the United States.

However, "Operation Hold the Line" does not mean non-U.S. residents have stopped tapping into the American welfare system or have stopped having babies in the United States to secure coveted U.S. citizenship rights.

When I did my news article two years ago, it took as little as $3 to $20 to enter the United States from Mexico illegally to have my baby free of cost at the El Paso county hospital, compliments unwilling of U.S. taxpayers.

However, in my reporting, I discovered that most of the other pregnant women I encountered at the county hospital in El Paso weren't even having to enter the country illegally to give birth to American babies. Instead, they used their tem-

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porary shopping visas to enter the United States, make doctor visits and deliver their babies in El Paso.

I think it is fair to say that many Mexican women—particularly the wealthy—don't give birth in El Paso at the expense of U.S. taxpayers. Some of the Mexican women pay for private doctors and private hospitals, while other women (such as one of the women in my news story) pay for less expensive midwives when they give birth in the United States.

But my story was about the many Mexican women who use the county hospital in El Paso to give birth to their children at the expense of El Paso taxpayers.

In Mexico, it is no secret that it is easy to secure U.S. welfare benefits, without U.S. citizenship, particularly if you have an American-born child.

All that is needed is an address inside El Paso county, something that is easy to obtain, since most Juarenses have relatives or friends in El Paso.

My experience began with several men who approached me as I stood on the Mexican side of the international bridge into El Paso one day in May of 1993.

The people smugglers, who called themselves "coyotes," on the Mexican side of the international bridge apparently made their living crossing Mexicans illegally into El Paso. As a pregnant woman, the coyotes assured me they could smuggle me into the United States and deliver me to the local county hospital, where I could have my baby free of charge.

As an added bonus, the smugglers praised the benefits of having an American-born baby. There could be welfare payments, public housing, public education, and even free milk, orange juice and peanut butter to feed on under the U.S. WIC—Women, Infants and Children program.

Intrigued by what I heard, I went back to the newspaper, where I talked about my experience and convinced the editors that this story was worth pursuing.

Days later, I returned to Juarez to do the story and began to walk across the international bridge into El Paso. Once again, several men approached me with promises to cross me into El Paso. Their promises seemed to hold true. I stood at the bridge and watched them smuggle dozens of people into El Paso.

It was as simple as waiting around until the U.S. Border Patrol truck was filled with illegal aliens who had been apprehended. As soon as the truck left to process the aliens, dozens of illegal immigrants simply strolled across into U.S. soil.

I pretended to be afraid of getting caught by the U.S. Border Patrol. But the smugglers assured me that getting caught was a mere inconvenience. They said the U.S. government holds illegal aliens for only about 15 minutes and then transports them back to the Juarez side of the bridge.

As I discovered in my report, the smuggling operation had become an industry of its own. There were several package deals one could take advantage of: I could walk across the river with the mob of people for $20. From there, I could pay $35 for a taxi ride to the county hospital, or $20 for a coyote to walk me to a "safe" bus stop where I could catch a bus ride to the hospital.

Pretending I could not afford the minimum $20 fee, a sympathetic "coyote" told me I could cross for only $3 by taking a raft ride across the Rio Grande. But I would have to go near the Downtown international bridge, where water levels were low, only about 3 feet high, he said.

The next day, I went to the Downtown international bridge, where it was common to see old rafts, boats or tire tubes on the river. I was offered the rafting service for $2 to $3, and I watched as one pregnant woman took the river ride and was helped to climb the river levy into El Paso. From the Downtown international bridge, too, the county hospital was only a bus or taxi drive away.

In pursuit of the story, I went to the county hospital a few days later to see if the coyotes were right about how easy and free it was to have an American baby.

I sat in the lobby for hours, just observing the women who visited the hospital. Pretending not to know English, I asked the Mexican women about how to register at the hospital. All of them were very helpful and understanding. They told me all I needed was a notarized letter from an El Paso County resident, attesting to the fact that I lived with him/her in their home. No one would check a passport, or any other type of identification, I was told. No one would even call the person attesting to my residency—a fact that I later confirmed with hospital officials.

Because I worked under my maiden name, I got my husband to write me a letter stating that I lived with him in his home and did some cooking and cleaning. We had it notarized, since the information was technically correct.

I returned to the hospital with letter in hand. After a short stay in the lobby, it took only about 10 or 15 minutes to register to have my baby at the county hospital.

The hospital staff was very supportive and pleasant, informing me of the welfare benefits that were available to me. Aside from the letter, no one asked me for identification or questioned my U.S. citizenship.

Later, I found out that it is against the law for county employees to ask about citizenship. Also, hospital officials said they never check up on the residency of the patients because it would be considered discriminatory to check up on the women. But I questioned why they didn't check up on the women, not based on U.S. citizenship, but on whether they were residents on the county—I told them it would be as easy as following the women out to their cars, since many of them were driving vehicles with Mexico license plates, a possible clue that they weren't living in the county.

Another advantage of the shopping visas, is that it is easy return to El Paso when it is time to give birth. Several of the women said they stay with relatives or friends the week before their delivery due date, to ensure they make it to the hospital in time.

The evidence of what is taking place is clear. Visit the international bridges, and it's common to see adults using their shopping visas to enter the country. But their children enter the United States by just saying, "American," since they are U.S. citizens. The birth certificates are priceless. Many of the parents laminate the birth certificates and have them handy in case immigration officials question the citizenship of their children.

With the declining economic situation in Mexico, it is quite popular to give birth to American children. It is a sort of insurance policy for the children, providing future security of choosing whether to live in the United States as adults, the women told me.

But a U.S. citizenship, also makes it easier to secure welfare benefits and enroll their children in American schools, they said. El Paso and Juarez are so connected, that Juarez residents can use the address of a relative in El Paso to tap into services.

That's not to say that all Mexican women giving birth in El Paso do it only to obtain U.S. welfare.

In my own family—half of which lives in Mexico—only one of the cousins was not born in El Paso. She was born in Juarez, and only because family finances turned sour at the last minute and my cousin could not afford to give birth to her daughter in El Paso. But her other two children are American.

Still, I am glad to report that none of my family members are using American welfare benefits. However, I do have a close friend from Juarez who went on food stamps and welfare when her husband left her, using the address of a friend in El Paso even though she was living in Juarez.

Now that she's back with her husband, who makes a very good living, she still accepts the welfare and food stamps because it allows her to buy American food products in El Paso, which she loves but would be too pricey because of the peso devaluation.

What I have just told you is information that I come about as a reporter and in daily observations.

As a former journalist, I wasn't going to give my opinion because my job was only to report the facts. I repeat that I had no agenda when I wrote this story.

However, now that I no longer am a journalist, I think I should give my opinion to put the information I have given you into perspective.

Again, I want to make it clear that this issue is not about Mexicans, since immigrants from other countries appear to be doing the same things from what I have read.

In my city, this immigration issue is tearing us apart as a community. El Paso, which is more than 70 percent Hispanic, has split opinions about the situation. In our border city, Hispanics are the most divided of all.

About ⅓ of us think that there should be no borders and that people should be able to make a life wherever they want. About ⅓ of us think that borders should be shut and no more immigrants should be let in until the country can take care of "its own." And the remainder of us are somewhere in between. We think that immigrants have a right to make it in the United States, but that they should not have such easy access to welfare, since it is unhealthy for immigrants to enter the United States with the idea that you don't really have to work hard to live in the United States since things can be free.

I guess my thinking is closer to this last example. I'm starting to think that this easy access to benefits is adding fuel to the anti-immigrant sentiment around our nation. It hurts me when I hear people say that all immigrants are here for a free ride. When they came to this country, my parents worked very hard—and endured many of the abuses and disadvantages in the work place that immigrants face—to give their children a chance at the American dream. As difficult as it got, they never once called on help from welfare. Along the way that taught us a strong work ethnic and taught us that education is the way to success.

Should there be automatic citizenship? Even with all I have said, I still think so. Being a first-generation American, I can tell you that with a shrinking world, this country cannot afford to do without diversity. I have an insight into a variety of worlds just because I speak two languages. I have an understanding of different cultures and how misunderstandings can occur. And unlike many Americans who have lived in the U.S. for generations and have lost hope—I believe this is still the best country, offering all of the possibilities in the world.

But I do believe that the system is being drained. I believe that people outside of our country are taking advantage of the system, because they can. Who amongst us would not pick up $20 bills that were placed on the ground before us.

Instead of taking away that wonderful right of citizenship, work on the abuses to the system that anger so many and add fuel to that anti-immigrant sentiment. Let us not forget that this country was made great through the hopes and dreams of immigrants.

Love ya, dad — oh, and this call is collect

By Benjamin Rachi
El Paso Times

That old phrase "Daddy's money" has a ring of truth about it today.

More collect phone calls are made on Father's Day than on any other day of the year, according to AT&T, the nation's largest long distance phone company.

And that — despite the fact that fewer people make long distance calls on Father's Day than on Mother's Day. Last year, there were 15% million calls made on Mother's Day and only 3% million made on Father's Day.

But the number of collect calls made on Father's Day was 25 percent greater than the number on Mother's Day.

It could not be determined how many Father's Day calls were made last year to or from El Paso but an AT&T manager in New Jersey said it's been a nationwide trend for many years.

"We've seen this trend ... after year," Jack M. Wood, AT&T product ... said in a recent statement. "It's ... been happening since Father's Day was first celebrated nationally some 70 years ago."

[illegible] Brenda ... go home ... theory. "... are obliged to ... parents that ... are related ... as strong ... [illegible]

"We've ... made for ... But when ... wanted a ... of something ... phone ... phone ...

TIMES TOPIC: BORN IN THE USA

Paul Gutierrez / El Paso ...

Maria, right, who is pregnant, crossed the Santa Fe Bridge with her husband, Tomas, for a health ... clinic last Saturday. The couple are Juarez residents, but have passports to enter El Paso. They expect their first child to be born in El Paso. Story, 1A

Crossing the border to have a baby

By Emily Guerrero
El Paso Times

There's a sort of sisterhood among the pregnant Mexican women who gather at Thomason Hospital and Texas Tech Medical Center.

They share advice and commiseration with strangers, for they share a goal: having their babies born as U.S. citizens in a modern American hospital.

It's no secret that undocumented women have resorted to Thomason for delivering their babies and to Texas Tech for prenatal care.

That's why I was there at Texas Tech — nervous, very pregnant, with no identification. I wanted to find out just how this very unofficial system works.

Many Mexican citizens own a passport/visa — which allows them to remain in the United States up to 72 hours — to use U.S. medical care at various places in El Paso. The short-term shopping visa ... are common among Mexicans ... more

Reporter tests the system

El Pasoans complain often that pregnant Mexican women enter the United States — sometimes illegally — to deliver their babies without charge at Thomason Hospital.

This, the argument goes, costs every El Pasoan whose taxes pay the bills for the busy county hospital. Thomason can do little about it. Federal law prohibits questioning a patient's citizenship.

To explore this border phenomenon, El Paso Times reporter Ernie Jaurequi — only weeks from delivering her second child — followed the rules a Juarez woman would have to have her baby in El Paso. Without identification and with only a notarized paper attesting to her residency, she was admitted to Thomason Hospital's prenatal care program.

Along the way, she met warm, supportive Juarez mothers-to-be who helped her, nurses who offered pacifiers to struggle her across the river and to the hospital, and patient employees of Texas Tech medical center and Thomason who treated her with respect and kindness.

working prenatal care at Texas Tech and pre-registration for delivery at Thomason.

Inside Texas Tech, a ... she and ... three hours ... many workers.

"May I help you?"

"Obstetric ... Mrs. ... pregnant ... doctor. I need ... wanted to ... a doctor," I said. ... should ... and ... I ...

The woman ... immediately to ... and ... added a ... smile.

She asked if I lived in El Paso.

"Sí," I answered.

She asked if I had picture identification.

"No."

Again she smiled, handing over a piece of paper and telling me how to register for prenatal care. I would need a utility bill from a home in El Paso County and a notarized letter from the homeowner verifying

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Crossing

my residence there.

I picked up the paper and wobbled from the office. I sat on a comfortable purple sofa in the lobby, staring at the paper. A woman approached me.

"*No se preocupe* (Don't worry)," a pregnant woman in her 30s told me, taking my hand in hers.

She looked at my paper and sighed.

"This is very easy," she told me in Spanish, introducing herself as Martha. I told her I was "Angelica," part of my first name.

To register for prenatal care and delivery at Thomason Hospital, all I needed was help from a friend or a relative who lived in El Paso, she said. They could write a simple, one-line letter attesting to my residence in their home. The letter could be notarized for about $5.

"My letter cost me $3," Estela, sitting next to us with her infant in a stroller, joined our conversation.

"But wouldn't hospital officials find out I didn't live there?" I asked, trying to look astounded.

No one ever checks, the women assured me.

Martha, a domestic worker expecting her third child, had been in the United States illegally for more than 10 years. She came over while pregnant with her first and simply stayed.

Estela lives in Juarez, but used a *pasaporte local* to come into El Paso. An aunt had attested to her residency in El Paso, she told me.

Medicare and more

The women told me about Medicare, which they said would pay the full cost of my delivery — about $1,600 for a normal birth and $2,500 for a Caesarean section. And they told me about WIC — the Women, Infants and Children program — that provides formula and other food for babies born to poor mothers.

Eventually, I could apply for public housing and food stamps, the women told me.

We chatted about the benefits of an American baby: a better education and a brighter future for the child. And they said my American baby would protect me from deportation. Once I had the baby, I would be able to walk the streets without fear because, Martha said, "It's not like they can deport you and the baby. Your baby is American and it needs its mother."

Estela and Martha left. I walked through the lobby and back outside.

"*No se vea tan preocupada*," a woman called out to me. "Don't look so worried."

Ana Maria, a young mother patting her baby's back, assured me I would not be turned away. She, too, lived in Juarez, she said, but received medical care in El Paso for her American-born child.

I asked Ana Maria and other pregnant women and new mothers outside the hospital what I needed to qualify for care.

If I couldn't get a notarized letter, Ana Maria said, I could just wait until I began labor to go to Thomason. That's what she did with her first child — "before I knew how easy it was to register."

I could wait for labor in the cool, comfortable lobby of Texas Tech during business hours. Lots of women did that, Ana Maria said. She also showed me the lab area, where dozens of women awaited medical tests.

"Sit here," she said. "No one will bother you. They'll just assume you're waiting for lab work."

Outside again, I approached another pregnant woman as she got into a car with Mexican license plates. I asked about her paper. Blanca reached for a file full of documents and showed me her notarized letter.

I pretended not to know English as I silently read it. "This letter is to verify that Blanca Enriquez (not her real name) lives at our home at ..."

Taking out a pen, Blanca copied the letter for me on a piece of paper and told me to follow the format.

I thanked her and headed for the bus stop. "*Suerte*," she called after me. "Good luck."

Little paperwork needed

I returned to Texas Tech the following day with my notarized letter in hand. I used my own utility bill — with my husband's name on it. He also signed a letter saying I lived at our address. I got it notarized Downtown for $3.

The receptionist took the utility bill and the letter and asked if I had identification. "No," I said. She put my name on a list.

I sat in the packed waiting room.

"*No es de aqui* (You're not from here)?" asked Elvira, a motherly looking woman in her late 40s. "You remind me of me, when I was younger," she said.

The woman, accompanying her pregnant daughter, said I had nothing to worry about. She reminisced about coming to El Paso through California, from Tijuana 20-some years ago. She, too, was illegal, scared and pregnant in this city, she told me.

Elvira looked over my documents, then waited for my name to be called. She coached me about what I'd be asked and what my replies should be. Then she went with me to the registration desk.

The man there took my documents and asked a few simple questions: Name, address, telephone. He looked up and smiled several times as he typed information into his computer. Then he took what looked like a credit card, passed it through a computerized device and handed me my own El Paso Care Card.

The process took less than five minutes. I was registered to have my baby at Thomason.

Thomason criticized for free baby deliveries

Thomason Hospital suffers a lot of criticism for delivering the babies of Mexican citizens, often without charge.

But few of the critics understand that there's nothing the hospital can do about the situation.

"Pregnancy is a nine-month process and we play a 24-hour part in it, yet we always come out to be the bad guys — even if we have all of these laws that say we don't have a choice (but to provide service.)" hospital spokeswoman Margaret Althoff-Olivas said.

"Our hands are tied, period."

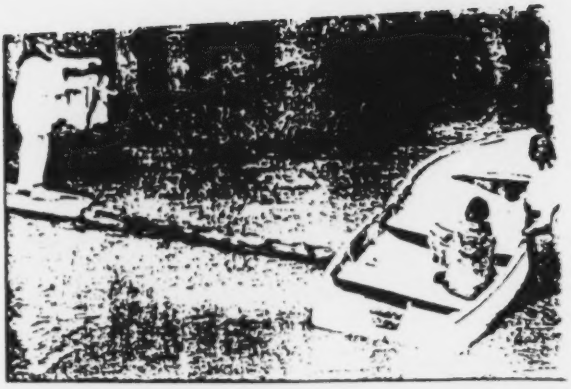
Federal law prohibits the hospital from asking for proof of U.S. citizenship. Therefore, hospital officials have no data about how many of the Thomason births are to Mexican citizens.

The hospital can ask for proof of residency in the county. A utility bill and a notarized statement from a landlord suffices.

And the hospital cannot, by law, withhold medical care until that residency is verified, Althoff-Olivas said.

Thomason delivers almost half of all of the babies born in El Paso County — just under 7,000 last year.

In 1992, one baby was born every hour of every day during July.



Rudy Gutierrez / El Paso T

El Paso Times reporter Emily Jauregui, left, watched a woman board a boat on the Mexican side of the Rio Grande after negotiating with the boat operator on fares to cross into El Paso illegally Saturday. Jauregui declined a ride to the other s ide.

Coyotes include Thomason in itinerary for pregnant women

By Emily Jauregui
El Paso Times

The coyotes swarming about the Mexican side of the Rio Grande bridges notice an obviously pregnant woman. They offer all sorts of package deals, including a ride to Thomason Hospital's front door.

That, at least, was my experience.

Nine months pregnant — and looking every day of it — I parked at Juarez's Chamizal Park one recent weekday and trudged toward the Cordova bridge.

The coyotes — people-smugglers — wasted no time.

"*¿Quiere cruzar?*" ("Do you want to cross?") asked a tattooed man — one of dozens sitting along the bridge. He looked too sleazy for conversation.

A few steps later, another man promised "*Yo le puedo ayudar.*" ("I can help you.")

Across the bridge, on the U.S. side, a man in his mid-20s motioned with his hand, asking if I wanted help crossing over. I nodded "yes," and he dodged traffic on both sides of the bridge to reach me.

"It looks like you're due," Tony said.

All couple wants is best care for unborn baby

By Emily Jauregui
El Paso Times

Tomas and his pregnant wife, Maria, don't want to "cheat" El Pasoans. They just want the best medical care they can afford.

Using their passports *local*, the Juarez couple has been crossing over to El Paso regularly to visit Maternidad La Luz in preparation for the birth of their first child.

The visas are hard to get — they are given only to those who can prove they are gainfully employed in Mexico and have no desire to work in the United States.

In Juarez, their baby's birth would cost nothing under Mexico's Seguro Social health program, he said.

"But the clinics and hospitals are too crowded. Sometimes you wait hours to see a doctor. And the service just isn't that good. I just want her to have the best care."

The birth will cost them about $500 through the El Paso midwife clinic, plus about $100 for medical tests.

Tomas, an accountant, and his wife don't plan to move to El Paso or seek any form of welfare benefits.

But they admit they want their child, who will be a U.S. citizen, to have the option of living in the United States when he grows up.

"There are better opportunities in this country for our child to have a better life," Tomas said. "And, as an American, our child won't have to worry about a passport to come over."

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I nodded.

He said he could not only get me across, but deliver me to Thomason.

How much?

"Fifty."

"¿*Dolares*?"

"*Si*."

"I don't have that much."

"How much do you have?"

"$27."

He peppered me with questions. I said I was from Chihuahua City and had been in Juárez four months. I said I had "papers" from a friend who looked a lot like me.

He finally offered to take me across for $20 — with no guarantees of a ride to the hospital. Atop the bridge, he pointed out Thomason Hospital in the distance.

Then we walked to the U.S. side of the bridge as he showed me how we'd cross: Two men were crawling through a hole in the wire fence. Then they jumped a low barricade and were on a street in El Paso.

I told him I was much too pregnant to squeeze through a hole in a fence. So he pointed to a crowd of dozens of people standing around, patiently watching a green U.S. Border Patrol jeep.

When the jeep was full of suspected border-crossers, it left. That signaled many in the throng to trot across a portion of Chamizal Park. Others casually strolled along the sidewalk into El Paso.

I stalled.

Tony went into his sales pitch, describing the advantages of having my baby in the United States. He told me about food stamps, welfare and WIC.

"*WIC*?" I asked.

Under the Women, Infants and Children program, he said, I'd get free formula, orange juice and peanut butter for my baby. He had to explain what peanut butter was — there's no Spanish word for it.

He warned that Thomason would turn me away if I wasn't actually on the verge of delivering my baby, so I should wait until the contractions became unbearable. He said I could await that stage at any of the housing complexes along Paisano, where I would blend in with the residents who escape the heat by spending time outside their apartments.

Finally, I declined his offer and left him there by the bridge.

□ □ □

A few miles away, at the Paso del Norte Bridge Downtown, coyotes were everywhere — about one every 10 feet. The competition must push the prices down. The offers here were mostly for $2 or $3, but I'd have to ride an inner tube across the Rio Grande.

"It's not dangerous," a coyote called Chuy told me.

I followed him to the river — a stone's throw from the bridge — and watched as the coyotes maneuvered the inner tubes, their customers settled into the center, across the river.

Chuy pointed: "See, the water only reaches his waist. Even if you fall, you won't drown."

A pregnant woman wearing a checkered red-and-white outfit approached the coyotes for a ride across. She said little, asking only what it would cost for a little extra help because of her condition.

She paid $6 for the ride across and help up the river's steep concrete bank.

Once across, one coyote tugged at her hand while another pushed from behind until she made it up the bank. One walked with her around parked railroad cars and into Downtown El Paso.

"See, it's easy," Chuy told me. He offered a choice of package deals.

For $35, a taxi on the U.S. side would deliver me to Thomason. For $20, he'd walk me to San Jacinto Plaza and get me onto the correct bus to the hospital. I wouldn't have to pay until I was in the taxi or on the bus, he said.

"What if we get caught?" I asked.

Chuy laughed, saying *la migra* would detain me only about 15 minutes, then return me to Juarez. For $15, we could cross the bridge all day long, if necessary, until I was safely across.

Chuy's package deals were similar to a half-dozen others I was offered that day.

The smuggling business is a booming industry in Juárez, said David Ham, U.S. Border Patrol's supervisory special agent in charge of the anti-smuggling unit.

From Oct. 1 to June 15, said Border Patrol spokesman Doug Mosier, 187,586 undocumented immigrants — most from Mexico, China and Central and South America — were caught by Border Patrol officials. That's up six percent from the same period a year earlier.

No figures are kept on how many of those are pregnant women.

"There's quite a network," Ham said, adding that coyotes are very protective of the tiny bit of turf from which they peddle rides across the river.

BENEFITS OF HAVING BABIES HERE

Juárez women hoping to give birth in El Paso list a string of presumed benefits for babies born in the United States:

■ **Better educational** and job opportunities for a child who is born a U.S. citizen.

■ **Medicaid,** for those who qualify, can pay the full cost of the delivery and postnatal care.

■ **The Women, Infants and Children** program provides free milk, juices and other food for children through age 5.

■ **As a citizen,** the child will not be deported from the United States and, many women believe, the mother will generally be ignored by U.S. Border Patrol agents.

■ **With American children,** a family with legal residency has better access to public housing and other social programs.

Mr. CANADY. Thank you very much. I want to thank each of the members of this panel for their testimony. It has been very helpful.

I understand, Professor Schuck, you have to go to the airport. I do have a couple questions, but leave when you need to go. I don't want to detain you, and make you miss your plane.

In Mr. Dellinger's testimony earlier today, and I don't think he actually touched on this in his spoken comments, but in his written testimony he said, referring to the book that you authored, "Schuck and Smith are proposing a change in the law not a plausible reinterpretation of the Constitution. Their theory would require a repudiation of the language in the Constitution itself, the clear statements of the Framers' intent, and the universal understanding of the 19th and 20th Century courts. Indeed, the authors themselves concede that there is no judicial precedent in support of their theory."

Would you respond to that?

Mr. SCHUCK. Well I think it's——

Mr. CANADY. Now this is on the legal issue, not the policy issue.

Mr. SCHUCK. Yes. I think it is perfectly clear that the Framers of the citizenship clause never envisioned this particular problem. There were not illegal aliens at that time. Professor Neuman has argued that there were. I respond to his claim in my testimony, so I won't dwell on it here.

For all practical purposes, there were no illegal aliens and the Framers were not concerned with that problem. What we must do, therefore, is to try to identify the underlying principles that animated the citizenship clause and apply them to a problem that never was before the Framers.

We identify in our book what we believe to have been the animating principles. They are associated with a body of thought that was very prominent in the 19th century at that time and was well understood by the Framers of the citizenship clause. It contained a theory of jurisdiction which we advance in our book and I have summarized in the testimony. It is perfectly true that the courts have not adopted this point of view. They have never had occasion to address it directly. They did so in dictum in the *Plyler* case. They addressed it very casually. I explain in a footnote in my testimony why their treatment of it was quite unsatisfactory. So Mr. Dellinger is certainly right that the courts have not adopted our position, but they have not explicitly rejected it either.

Mr. CANADY. Let me follow up. As I understand your testimony, it's your view that on policy grounds, the proposals that are before the subcommittees are a bad idea?

Mr. SCHUCK. Yes.

Mr. CANADY. And that you would not recommend that we pursue those. But on your legal analysis, is that the Congress would have the power to act on this issue by statute. That's your——

Mr. SCHUCK. That's correct, although I think it would be unwise to do so.

Mr. CANADY. I understand that. But you believe that even though it would be unwise for us to do it, even if you didn't have the policy objections to Congress addressing this issue, you would believe that the proper way to address it would be through a constitutional amendment.

Now let me ask you to respond to this. Ordinarily, I think the view of most people is that a constitutional amendment should be a last resort. Some of us have been criticized for proposing certain constitutional amendments.

Mr. SCHUCK. I was going to say that these days the presumption seems to be reversed.

Mr. CANADY. Well, for instance in the case of the flag amendment, we can argue about whether that's a good idea or a bad idea, but Congress did try to address that issue by statute and was unsuccessful in doing so. So the general principle I think that most people would follow is that you don't immediately jump to trying to amend the Constitution to address a particular problem if there are other ways to address that problem, such as by enacting a statute. That would ordinarily be the preferred course. Do you reject that general principle?

Mr. SCHUCK. No. Of course I heartily endorse the principle that the Constitution ought not to be trifled with and that amendments to the Constitution ought to be resorted to only in the most extreme circumstances. I think that this is not such a circumstance, but I also believe that when a change is to be made in a longstanding practice that affects the vital interests of lots of people and that moreover has been endorsed by the courts and most scholars, although my view is that that view is wrong, I think that it's unwise to undertake a change of this kind simply on the vote of a transient majority. It seems to me that the seriousness of a change of this kind requires that it be approached in a rather different, more deliberative fashion.

Mr. CANADY. Thank you, Professor. I have no additional questions. Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chairman. Recognizing that the professor will have to leave soon, let me try to focus my first questions with the professor.

Professor Schuck, let me ask, you made some very interesting observations. You don't believe policy should drive us to changing birthright citizenship, but you believe that Congress has the power to do so. If it found, say, through some court action after Congress should act based on your interpretation of the ability to do so, change birthright citizenship, should the Congress act and the courts reject that congressional action, do you think that at that point we should stop or we should still consider going through a constitutional amendment?

Mr. SCHUCK. No. I think you should stop. I think that this is not a prudent expenditure of congressional energy for all the reasons that I gave.

I can imagine a circumstance in which revision of the birthright citizenship rule might be justifiable. We are very far from being at such a situation. It would require that the enforcement of our immigration laws be so much more effective than it is and that I think it is ever likely to be, given the constraints under which that operates, that it is for all practical purposes a nonexistent possibility.

Mr. BECERRA. I appreciate your observation about what we might end up with should we go about trying to change birthright citizen-

ship status that we provide right now for people. You did talk about Germany and so forth.

Actually, Mr. Chairman, let me do this. I understand that the professor may have to go. Let me yield back my time for right now, if I could be recognized to continue my 5 minute questioning, in the event that some of the members have questions for the professor.

Mr. CANADY. Quite frankly, I think if the professor doesn't go now, he's not going to make his plane.

Mr. BECERRA. Thank you very much. Thanks for being patient. I'll go ahead and continue.

Ms. Zinser, let me ask you a couple of questions. I appreciate your testimony as well, because you obviously as a representative of the local government have to deal with the whole issue. You mentioned some numbers and the costs involved. There was a study done in San Diego County by the Healthcare Administration Programs at the National University in San Diego. Are you familiar with that particular study?

Ms. ZINSER. No. I'm not.

Mr. BECERRA. Let me just mention a couple of the findings of the study. It mentioned a lot of what you happen to have mentioned. It also did talk about the difference in preventative costs versus remedial costs of health care. If you try to provide prenatal care services to someone, you are certainly going to save a lot more than if you wait until the baby is born and have to deal with neonatal intensive care units and so forth. But they also mention different figures from what you mentioned with regard to costs incurred by the county for services, healthcare services to the undocumented, and the revenues that are generated through the undocumented.

They mention that the costs, healthcare costs for the county of San Diego in 1992 were $26.6 million, and that the revenues that the county generated from the undocumented were approximately $60.5 million. They count payroll tax, sales tax, income tax, excise tax, lottery tickets, gasoline tax and vehicle registration fees. I know that no one here is expert on all these different studies and so forth. But would you agree that there are revenues that are collected through the undocumented immigrant?

Ms. ZINSER. There are revenues, yes.

Mr. BECERRA. And isn't it the case, I know an L.A. County study found that it's the case that most of the revenues generated by these immigrants, legal or undocumented, but specifically speaking of undocumented, actually go to the Federal Government and never make it back to the locality like San Diego County, so that you never even get to see even a fair share of the revenues that are paid by the undocumented immigrant. Would that be fair to say?

Ms. ZINSER. I think that's fair to say. Our county's concern is that we believe there are about $304 million of costs incurred and the net cost to the county is $64 million. That's the county, not the State and not other municipalities.

Mr. BECERRA. Understood. With regard to the families that you spoke of that utilize the Medicaid or Medi-Cal services as a result of having a child born in this country. Are you aware of any families, immigrant families, undocumented immigrant families, who have come in already child in hand? In other words, having had children before they cross into this country?

Ms. ZINSER. I would presume that occurs, but I'm not personally familiar with the statistics.

Mr. BECERRA. I ask that because I think both Professor Neuman and Professor Schuck I think may have mentioned that. Whether you deny someone citizenship won't drive them ultimately to make a decision to leave this country, because what drove them to this country wasn't necessarily I think to have a child but to get a job. Although Ms. Juaregui Alcantar just mentioned that there are individuals who do it, I think the vast majority of people who come into this country are doing so to stay, or at least to stay long enough to earn some money.

I don't know if your experience is, as you mentioned, you don't know any particular families personally, but I was just wondering if you might have had that experience.

Let me ask Professor Erler a question. What determines allegiance?

Mr. ERLER. What determines allegiance, the Framers of the 14th amendment were quite clear. It's political allegiance. We have heard some talk here that everybody who was subject to the laws of the United States is subject to the jurisdiction of the United States, but that was denied by the Framers of the 14th amendment. They said that you must owe allegiance to no other country. They explicitly said that this means that you must be within the political jurisdiction of the United States. So the idea that anyone who was subject to the laws of the United States is also subject to the jurisdiction is not true. That was not the understanding of the Framers of the 14th amendment. The idea of jurisdiction was political jurisdiction in the sense that members of Indian tribes were not subject to the jurisdiction of the United States.

Mr. BECERRA. But when the congressional debate which ensued as a result of the amendment provides us with a record that shows that several members at that point debated whether Chinese immigrants would be allowed to become United States citizens—children of Chinese immigrants who were not permitted—at that point, I don't know if they were permitted to become U.S. citizens or considered U.S. citizens, but the children of these Chinese immigrants would become U.S. citizens. The question was posed by one of the—I'm not sure if it was a Representative or Senator, to those who were proposing the amendment. The proponents of the amendment said certainly a child, whether Chinese or Gypsy in origin, just like any German child born to German immigrants would become a U.S. citizen. How do you reconcile that with what you say?

Mr. ERLER. Well, I think that the problem here is that, as has been mentioned, the problem with illegal immigration was not a very grave one in 1868. But I think that the problem here is that anybody who comes to the country legally would be subject to the jurisdiction of the United States because this is more or less an offer by the United States. If you accept our terms, and those terms are specified by immigration laws and procedures for naturalization, this makes the people subject to the jurisdiction of the United States. They consent to be subjected to the jurisdiction and they are subject to the jurisdiction.

It is not the case with the illegal immigrants, however, because they have come here against the laws; this is almost proof positive

of the fact that they are not subject to the jurisdiction of the United States, and do not believe themselves to be subject.

Mr. CANADY. The gentleman's time has expired.

Mr. BECERRA. Thank you, Mr. Chairman.

Mr. CANADY. I'll recognize Mr. Bryant. Mr. Bryant will ask some questions. Then we will recess for the vote.

Mr. BRYANT. I thank all of you for your testimony. I apologize for being in another meeting and missing some of it. The legalities of this will ultimately be decided by I guess the Supreme Court as we've got obviously some very superior legal minds here today that can't agree on it.

I am more concerned with the policy issues, the practical effects. The two of you who are in the areas where this occurs, I would be interested in an answer, if I could get one from you in terms of the policy. Again, Ms. Zinser and Ms. Alcantar. I'm from Tennessee, I cannot do as well as Mr. Becerra.

What is the practical effect, in your opinions, having dealt with the problem, having investigated the problem, of the potential for deterrence if one of these bills or an amendment passed? Would there be deterrence to prevent illegal entry? Admittedly our enforcement is—we just don't have the assets to enforce it as well as we'd like to, any law. But would this have a practical effect of serving as a deterrent to some people from coming over?

Ms. ZINSER. I think it would, because I find it curious that 51 percent of the moms giving birth immediately apply for public assistance for that child. If in fact they do have jobs, why are they applying for public assistance.

When we work with these families and aid these families, we have difficulties in determining whether or not they have income, because they are not legally allowed to work in the United States. They don't have Social Security numbers. The means we use to deter fraud rely on the existing systems, Social Security numbers, the State employment department's labor files, the tax files in California. So we are concerned about some abuses in the system.

Ms. JAUREGUI ALCANTAR. In my case, in the case of El Paso, I don't think if the laws were changed I don't necessarily think it would be a deterrent. I think in the El Paso area the case is that women from Mexico have their babies in the United States more as an insurance policy for their children. Juarez for them is a nice place to live. So it seems like they prefer to live in Juarez. They just like to have their children as American so they can be educated in American schools and if things go really bad, they can get American benefits. So I don't think—if you change it, the only thing that would change is that some of the abuses to the Medicaid and other systems would change.

Ms. ZINSER. I think so too; I think there's some confusion about the residency requirements for these categorical aid programs. You must be a resident of the community where you receive the benefits. We think a lot of people receive benefits from the county of San Diego, and like Emily said, live on the other side of the border. It is very difficult for us to prove where someone lives when a relative writes a letter saying they live with them in the United States.

Ms. JAUREGUI ALCANTAR. And there are not the resources to check up on it. You know, in my case, after I called the hospital as a reporter and I told them what we had done, the spokesperson actually cried on the telephone. I asked them well why don't you go to some of their homes and at least catch maybe 10 percent—that they don't live there. She said, "We don't have the resources to go knocking on doors. Even if we did, what would we say, okay where are they, show me the room, show me their underwear" she told me, which I thought was funny. So that's basically the situation. A lot of it is just for the welfare, because Mexico is such a poor country. With the peso devaluation, the American dollars that they get are worth a lot in Mexico.

Mr. BRYANT of Tennessee. Ok.

Ms. ZINSER. The other thing that I hear often from the line staff that are working with these mothers is they take their kids back to Mexico and register their births in Mexico and get a Mexican passport so that they can go back and forth across the border very easily.

Ms. JAUREGUI ALCANTAR. I believe they have dual citizenship until they are 18, they have to decide whether they are going to be Mexican or American.

Mr. BRYANT of Tennessee. Thank you.

Mr. CANADY. Thank you. We are going to recess now for a vote. Mr. Smith will be back momentarily. So I believe that we'll resume as soon as he gets back. So bear with us.

[Recess.]

Mr. SMITH [presiding]. The subcommittees will reconvene. Let me explain what is going on. There will be another vote in about 5 minutes or so. What I am doing a little bit here is indulging myself because by coming back, I can get in more than 5 minutes of questions. Then we may probably be adjourning for the day.

Before I get to my questions, I do want to thank the members of the final two combined panels for the effort that they made. I am sure you all think sometimes or wonder sometimes if it's really worth it. You have come from New York, California, Connecticut, Texas, perhaps. It's a big effort. We appreciate it. To my knowledge, though, this is the first time we have ever, meaning the House, has ever had a hearing on this subject. So we are building a record for years to come and appreciate the expertise that you all contribute.

Let me go to my questions. Ms. Jauregui Alcantar, if I may start with you. A couple of quick questions. I think you covered this or touched upon it in your testimony. What did you find was the level of knowledge of the women who wanted to come to the United States to deliver a child? What was their knowledge of Medicaid and WIC and other public benefit programs? Were they sophisticated in their appreciation of what awaited them or not?

Ms. JAUREGUI ALCANTAR. Yes. It wasn't only the women who were pregnant and at the hospital, it was the people smugglers that I talked about. They knew a lot more than I did, which surprised me. They knew more than me about what I could receive if my child was American.

Mr. SMITH. Your observation, meaning more than you did, and you were a U.S. citizen.

Ms. JAUREGUI ALCANTAR. Yes. They spelled it out for me. You know, the WIC, the public housing, the public education for my child and things of that nature.

Mr. SMITH. Do you feel that the prospect not only of benefits, but the prospect of automatic citizenship encouraged women to come to the United States? How would you rate that as a factor? Was that the determinative factor? Was it just a minor factor? How important was the promise of citizenship for a child?

Ms. JAUREGUI ALCANTAR. I think it weighed heavy for them. Basically very important—and I didn't get this from the initial report, I got this from followup, because as I went down to the international bridges to cover other stories, I began to notice that in a lot, a lot of cases, whenever you see a child crossing the border, the parents show their visa, their shopping visa, but the child says American because they are American. The parents carry many times the birth certificate laminated and carefully tucked in their purses. Whenever they are questioned about their children they pull it out. So, to me, that showed me that it's very important, because it allows that access into the United States, and it allows their children all of these rights as an American.

Mr. SMITH. Right. I agree with you. I thank you for your testimony.

Ms. Zinser, I have a couple of questions. I am taking my questions in the order I read your testimony. You mentioned in 1992, there were 6,000 children born to undocumented immigrant parents in San Diego County hospitals. I have always wondered how do you determine who is an undocumented immigrant child?

Ms. ZINSER. These were cases where the mother applied for Medi-Cal benefits under the restricted eligibility program. That program only exists for undocumented immigrants.

Mr. SMITH. Ok. In the case of individuals though who come for some type of health care, there is no effort made to determine the validity of the documents that might be used to show that they are eligible, or is there?

Ms. ZINSER. There is an effort made to determine eligibility. However, if someone wants to apply for restricted benefits, we are restricted in what we can ask them about their citizenship status.

In reference to some of the comments by Congressmen earlier in the day, I want to be sure the committee understands that every time we take an application for public assistance, food stamps, AFDC, or Medicaid, we ask what your citizenship status is. That is a question on every form. So it's colorblind, basically.

Mr. SMITH. Right. Would it not be fair to say that it's awfully easy to perhaps fudge the truth or even use a fraudulent document and obtain health care benefits to which you would otherwise not be entitled?

Ms. ZINSER. There is fraud in the Medicaid program.

Mr. SMITH. If illegal aliens are not supposed to be eligible for Medicaid, does what you just say sort of explain how the illegal aliens are accessing benefits?

Ms. ZINSER. They are eligible for Medicaid restricted benefits. They are eligible by Federal law for pregnancy related services and life-threatening emergencies. The Federal Government currently

pays for 50 percent of those costs. The State pays the other 50 percent.

Mr. SMITH. You mentioned in your testimony that expenditures for services are growing at a frightening rate, with no end in sight. What has been the general rate of growth?

Ms. ZINSER. The growth in the undocumented case loads in about four years was somewhere in the neighborhood of 117 percent statewide.

Mr. SMITH. Over 100 percent in four years was the growth? That is just amazing. You know, if nothing else, we're finding out that it's a serious problem. We're less sure today about what to do about the problem. But clearly, the problem is undeniable.

Ms. ZINSER. I think that's what the border communities in particular are concerned about. Making sure that you all understand that this is a problem that we see. You need to hear about it.

Mr. SMITH. Thank you. Let me go to Professor Erler and Professor Neuman, and perhaps bounce some questions between the two of you all.

Professor Erler, I was struck and in fact convinced by your submitted testimony and what you have written on this subject in an article, that the legislative history surrounding passage of the 14th amendment in fact implies two things or suggests two things. One, clearly that illegal aliens were not considered as such when the 14th amendment was written. Second of all, I think that the jurisdiction clause is not just redundant, but in fact, has real meaning. In fact, according to the conversation that took place on the House floor in 1866 it could be interpreted to mean that there was an effort to restrict citizenship to those who were not foreigners or not aliens in addition to the other two classes.

But let me go back to a couple of points I remember making when I read this. You say that to assume as many do today that all persons born in the United States are automatically subject to the jurisdiction of the United States by virtue of their birth would render the jurisdiction clause superfluous.

Let me ask Professor Neuman, who disagrees with that, why you disagree. If words have meaning and there's a reason for that clause and it was a restrictive clause, why doesn't that restrict the group of individuals who would otherwise be given citizenship?

Mr. NEUMAN. That is a very easy question to answer.

Mr. SMITH. Good.

Mr. NEUMAN. First of all, the Supreme Court has explained what the clause means. It is not redundant. It excludes children of foreign diplomats, which is the subject of the sentence you are referring to. It excludes children accompanying invading armies. It has also been interpreted as excluding children born as members of Indian tribes, and it excludes, according to some, children born on foreign vessels of war. There are different views as to how often that needs to be mentioned, because there are not that many women on foreign vessels of war in the U.S. territorial waters giving birth.

That is what it means. It is not redundant. That doesn't mean it has the open-ended meaning that Professor Erler attributes to it.

Constitutional interpretation does not proceed by reading through a legislative history and finding a single sentence and pull-

ing it out and attributing to it a meaning which is inconsistent with the rest of the legislative history. There's a sentence which was previously discussed with Mr. Dellinger, in which it is said that this would exclude foreigners, aliens, ambassadors. If that sentence means something more than just ambassadors, then that means that no child who is born to foreign parents in the United States is a citizen of the United States. That would mean that *Wong Kim Ark* was wrongly decided, that permanent resident aliens' children are not citizens of the United States under the Constitution, and that all the people in the debates on the 14th amendment who thought that the 14th amendment was going to be protecting the children of the Chinese in California were wrong. That can't be the meaning of that sentence.

Mr. SMITH. Thank you, Professor Neuman.

Professor Erler, I am going to give you a chance to respond to that. Your article states that any reasonable person would have to agree that "subject to the jurisdiction of the United States" means those who are within the geographical limits of the country legally. That is, with the permission of the United States. Then you say, the fact that illegal aliens have violated laws in the United States precludes any possibility that they can be properly said to be within the jurisdiction of the United States.

What is your response to my question and/or what Professor Neuman said?

Mr. ERLER. Well, I think that so far from taking one sentence out of context, when we look to the meaning of the jurisdiction clause, the debate in Congress was rather—not extensive on that issue. But here we have the author of the citizenship clause saying what it meant. He was challenged at that point, you are making citizens out of Indians, you are making citizens out of the children of ambassadors who are in the United States. He said, no. No. Then he stated precisely what it meant to be within the jurisdiction of the United States.

Now what I meant by those other phrases was simply that if it's true that you are within the jurisdiction of the United States when you owe allegiance to no other country, the phrase that came out of the Civil Rights Act of 1866 and was used by Senator Trumbull in his remarks on the floor, that you are subject to the jurisdiction of the United States when you owe no other allegiance and you owe allegiance to the United States. Presumably what that means in the first instance is that you are willing to obey the laws of the United States and that no one who enters the country illegally can be subject to the jurisdiction of the United States. It means political jurisdiction. This was a phrase that was used over and over and over again in the debates. It does not mean just subject to the laws.

Mr. SMITH. One more question. Since the court under article 1 has plenary power over naturalization——

Mr. ERLER. In the Congress. Congress has plenary. You said the court.

Mr. SMITH. Pardon me. Since Congress has plenary power to establish national immigration policies, do you feel then that Congress could change the policy in regard to birthright citizenship by a statute?

Mr. ERLER. I do believe that. I believe that Congress can act under section 5 of the 14th amendment to define those who are subject to the jurisdiction of the United States. As I believe I said in my remarks, the Congress has done that time and time again by bringing Indians into the jurisdiction of the United States by legislation.

Mr. SMITH. Thank you. Because I'm going to have to go vote, I'd like to quickly ask every member of the panel to make any final point that they would like to make and give you a last chance to state a thesis or an opinion.

Ms. Zinser, we'll start with you.

Ms. ZINSER. From the perspective of San Diego County, we think it's a problem. We think that the welfare benefits are an attraction. We think you need to do something.

Mr. SMITH. That's straight and to the point. Thank you. Professor Neuman.

Mr. NEUMAN. Upon close examination, none of the arguments in favor of interpreting section 1 of the 14th amendment to permit Congress to have this power make any sense. If you look at the category of children born to temporarily, but lawfully present aliens and you test each of these arguments, and you say, how would this apply to this category of children, you will see that people are pulling together little fragments that point in different directions, and that the only reasonable interpretation of both the language and the legislative history is the one that the Supreme Court set out in *Wong Kim Ark*.

Mr. SMITH. Thank you, Professor. Professor Erler.

Mr. ERLER. I think when Mr. Dellinger previously said that any statutory attempt to deny birthright citizenship to children of illegal aliens would be clearly unconstitutional, he is incorrect. I don't think that there is a single legal precedent that would stand in the way of such a statute. I believe that there is plenty of precedent that would support it.

For example, in the *Elk* case, the court emphatically said that no one can become a citizen of the United States without the permission of the United States. I think that that is still good law. I think it should be the basis of good policy.

Mr. SMITH. Thank you. Ms. Jauregui Alcantar.

Ms. JAUREGUI ALCANTAR. My name alone has been a challenge. [Laughter.]

Mr. SMITH. Now don't you think I have handled it fairly well?

Ms. JAUREGUI ALCANTAR. Yes.

Mr. SMITH. You don't have to answer that, but I've been trying.

Ms. JAUREGUI ALCANTAR. What I'd like to say is that I do believe the system is being drained. I believe that people outside of the country are taking advantage, but only because they can. Who amongst us would not pick up $20 bills that were placed on the ground before us? But instead of taking the wonderful right of citizenship, I think we should work on the abuses to the system that anger so many and add fuel to the anti-immigrant sentiment. Let us not forget that the country was made great through the hopes and dreams of the immigrants.

Mr. SMITH. OK. Thank you. Let me add my own final summary of the day, if I might. First of all, the whole subject of birthright

citizenship is very much of a legitimate issue. I think that in a democracy, we have every right to consider whether laws or in fact constitutional amendments are serving their original purpose. That was one of the goals of today, to try to determine whether that was the case or not.

We have also heard a number of legal arguments. We have heard one argument that we can't and shouldn't tamper with the 14th amendment. We have had another argument that we can modify birthright citizenship by statute. We've had another argument that it would take a constitutional amendment to change the 14th amendment.

I think regardless of the ways that modification of the doctrine might occur, and there have been differences of opinion on that subject, to me at least, it has been clear that the impact of the 14th amendment has been in ways not foreseen by those who wrote it. In fact, as we have heard today, the impact would include attracting individuals to come to this country to give birth and to receive other benefits.

What we have heard is that the problem is real and growing. In the case of San Diego, the cost of the children of illegal immigrants has been going up at the rate of above 25 percent a year. In the case of Los Angeles County, we have had testimony made a part of the record that shows that the total cost to that one county alone exceed $1 billion, and that 16 percent of the individuals born in California, I think this is correct, are the children of illegal aliens.

As far as what this committee should do, I think that it is appropriate, at least for the time being, that we defer action and put our shoulder behind the immigration reform bill that has now been approved by the full committee, and make sure that that gets passed before any action might be taken.

I do think that we have to acknowledge that the 14th amendment, because it is not being enforced in ways as originally intended, certainly deserves scrutiny. That's why we had the hearing today.

Thank you all for being with us. We appreciate your time, your effort, and your expertise.

The subcommittees are adjourned.

[Whereupon, at 3:45 p.m., the subcommittees adjourned.]

APPENDIXES

APPENDIX 1—STATEMENT OF HON. ILEANA ROS-LEHTINEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Proposals to deny citizenship to children born in the U.S. are contrary to the greatest traditions of this country and, ultimately, counterproductive to the goal of full assimilation.

The success of our nation in science and economics rests to a major degree on the openness of this country to the ambition and energy of immigrants. Immigrants have made a tremendous contribution to American leadership in the fields of science and engineering. As George Gilder points out in The Wall Street Journal, half of the advanced degrees in the "hard sciences" (i.e.: computers, math, engineering) in the U.S. are held by first generation immigrants and their children. Allowing our historic openness to be replaced by hostility will deprive us of the world's best in these vital fields.

These proposals would permanently mark the children of undocumented immigrants who have no control over the actions of their parents. The net effect of such stigmatization would be the creation of a population that is estranged from the mainstream culture and prevented from assimilating in the time tested tradition of America.

In conclusion, adopting such a policy against the children of immigrants would reverse four centuries of traditional American justice and fairness on this issue. This tradition was spelled out clearly after the Civil War in the adoption of the 14th Amendment which states that "all persons born in the United States * * * are citizens of the United States".

APPENDIX 2—ADDENDUM TO PROFESSOR NEUMAN'S STATEMENT

Professor Erler's testimony also argues in favor of Congress's power to withdraw citizenship from children born in the United States. Most of these arguments have already been addressed, but a brief recapitulation, and attention to a few new aspects of the argument, may be useful.

Initially, it is important to recall that the question of birthright citizenship involves several distinct categories of children born in the United States. These include children of citizens, children of lawful permanent resident aliens, children of lawfully present nonimmigrants, children of illegal aliens, children of foreign diplomats, and children of noncitizen Indians. A proposed reinterpretation of the Citizenship Clause of the Fourteenth Amendment must offer a consistent account of whether the clause confers citizenship on each of these categories.

Like other revisionist efforts, Professor Erler's arguments are self-contradictory. He purports not to interfere with the *Wong Kim Ark* decision, which recognized that the Citizenship Clause guaranteed U.S. citizenship to the children born to lawful Chinese alien residents. But preserving *Wong Kim Ark* is utterly inconsistent with relying on snippets of legislative history that suggests that a child is not "subject to the jurisdiction" of the United States unless it owes exclusive allegiance to the United States.[1] Senator Trumbull did make a remark to that effect in the legislative history, but Senator Trumbull was mistaken, and his error was not shared by Senator Howard, or by the other Senators who understood that the Citizenship Clause would protect Chinese children born in California. Similarly, Senator Howard's sentence about "foreigners, aliens, who belong to the families of embassadors," obviously refers only to the children of diplomats, because otherwise it would not cover the children of lawful immigrants.

The traditional interpretation of the Citizenship Clause does not render the phrase "subject to the jurisdiction thereof" superfluous. It defines it in precisely the way that the Framers of the Fourteenth Amendment intended, as excluding tribal Indians and the categories traditionally excluded at common law like children of diplomats.

The traditional interpretation of the Citizenship Clause is not inconsistent with the notion that each country has the power to determine who its own citizens will be. The United States has exercised that power through the adoption of the Citizenship Clause itself. Usually nations do not give consent to the citizenship of individuals one at a time, but do so by broad categorical rules. If the United States wishes to narrow its present rule of birthright citizenship, it can do so only by constitutional amendment.

The fact that illegal alien parents may be in the United States in contravention of its laws does not change the fact that their native-born children are subject to the jurisdiction of the United States. First, it should be remembered that the Citizenship Clause addresses jurisdiction over the native-born child, not over its parents. Second, it is meaningless to speak of an newborn child as obeying or disobeying U.S. law. Third, and most importantly, the requirement of jurisdiction concerns the power of the United States and the obligation of obedience to its laws, not whether the individual has obeyed the laws. When children are born in the United

[1] *Wong Kim Ark* also refutes Professor Erler's attempt to attribute a restrictive meaning to the phrase "political jurisdiction" that would justify narrowing the Citizenship Clause:

"It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on *Thrasher's* case in 1851, and since repeated by this court, 'independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of the government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations.'"

United States v. *Wong Kim Ark*, 169 U.S. 649, 693 (1898). As this paragraph makes obvious, being subject to the "political jurisdiction" just means being fully subject to the legislative power of Congress.

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States to U.S. citizen parents, we do not ask whether the parents have paid their taxes or are fugitives from justice or have deserted from U.S. armed forces abroad—the children are born in the United States and are subject to its laws, and that entitles them to citizenship.

The case of *McKay* v. *Campbell*, 16 F. Cas. 161 (D. Or. 1871) (No. 8,839), discussed at the hearing, adds nothing new to this argument. McKay was born in the Oregon territory in 1823, at a time when power over the territory was provisionally shared between the United States and Great Britain pending resolution of their claims to the territory. McKay's father was a British settler, and the court merely held that McKay was born owing allegiance to Great Britain, and not to the United States, under the peculiar arrangements governing that territory. When the court spoke of citizens as being born "within the power, protection and obedience of the United States," id. at 164, it meant owing obedience to the United States.

Professor Erler further argues that Congress has power under Section 5 of the Fourteenth Amendment to determine who is "subject to the jurisdiction" of the United States, and has exercised that power to "extend" the jurisdiction to Indian tribes. This argument misconceives both Congress's power under Section 5 and U.S. nationality law. First, the Supreme Court has repeatedly emphasized that Congress's power to enforce the Fourteenth Amendment does not include the power to "restrict, abrogate, or dilute" the guarantees of the Fourteenth Amendment. *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 732–33 (1982); *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n.10 (1966). Congressional power to redefine the term "jurisdiction" would be particularly inappropriate, given that the Citizenship Clause of the Fourteenth Amendment, unlike the Due Process and Equal Protection Clauses of the Fourteenth Amendment, was specifically intended by the Framers as a limitation on future Congresses as well as a limitation on the states.

Second, Congress's extension of U.S. citizenship to individual Indian tribes was not an exercise of power to "extend" the jurisdiction of the United States within the meaning of the Citizenship Clause, but rather was an exercise of Congress's power to confer citizenship on persons who are not guaranteed it by the Citizenship Clause. Both before and after the adoption of the Fourteenth Amendment, Congress has conferred citizenship at birth on persons who did not obtain it by the constitutional *jus soli* rule, pursuant to Congress's power under the Naturalization Clause of Article I. An important example is the extension of citizenship to children born to U.S. citizen parents outside the borders of the United States. *Rogers* v. *Bellei*, 401 U.S. 815 (1971); *United States* v. *Wong Kim Ark*, 169 U.S. 643, 672 (1898). Extension of citizenship to particular Indian tribes has also been considered an exercise of the naturalization power. See *Wong Kim Ark*, 169 U.S. at 681; *Elk* v. *Wilkins*, 112 U.S. 94, 103–05 (1884); Felix S. Cohen, Handbook of Federal Indian Law 517–20 (1st ed. 1942). Indeed, *Elk* v. *Wilkins* explicitly describes examples listed by Professor Erler as exercises of the naturalization power.

Finally, Professor Erler's testimony concludes with the claim that the Framers of the Fourteenth Amendment could not have intended to adopt the common law rules of birthright citizenship because those rules are feudal in origin and inappropriate for a democracy.[2] Professor Erler is entitled to his political opinions, but it is obvious that they were not shared by the Framers of the Fourteenth Amendment or by the Supreme Court in its authoritative interpretation of the Fourteenth Amendment.

In summary, Professor Erler's testimony gives Congress no basis for assuming that it can change the birthright citizenship rule without amending the Constitution.

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[2] Part of the contradiction Professor Erler sees lies in the old British rule of indefeasible allegiance, which is inconsistent with an individual right of expatriation. But there is no necessary connection between birthright citizenship and indefeasible allegiance. The British abolished the doctrine of indefeasible allegiance in 1870 without changing their birthright citizenship rule, and modern Untied States nationality law includes both the birthright citizenship rule of the Fourteenth Amendment and the individual right of expatriation.

APPENDIX 3—STATEMENT OF THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican-American Legal Defense and Educational Fund [MALDEF] appreciates the opportunity to submit testimony regarding proposed changes to the Fourteenth Amendment of the Constitution. MALDEF is a national nonprofit organization dedicated to protecting and promoting the rights of Latinos in the areas of education, employment, political access, immigration and language rights.

Congress must reject proposals which eviscerate the rights of citizenship. Proposals to selectively eliminate birthright citizenship are inconsistent with the fundamental norms of the Constitution. Not only do these proposals fly in the face of the plain meaning of the Citizenship Clause of the 14th Amendment, but they conflict with the principle of equal protection under the law.[1] The alleged interest in regulating migration simply does not justify a radical departure from Constitutional principles through legislation or a Constitutional amendment. Lastly, abstract claims that citizenship rest only on a theory of "mutual consent" of the nation, are clearly insupportable.[2] Congress should recognize H.R. 1363, H.J. Res. 64 and H.R. 705 as dangerous incursions into our Constitutional heritage.

MANIPULATION OF BIRTHRIGHT CITIZENSHIP THROUGH HISTORICAL OR JURISDICTIONAL CLAIMS ARE SPECIOUS

Our American tradition has long established that citizenship is the right of each individual born in the sovereign's territory, regardless of the nationality of his or her parents. The concept of citizenship by birth, except for the brief and shameful detour of *Dred Scott*, was an established Anglo-American common law principle. Birthright citizenship was established for the children of freed slaves and reiterated for others in the Citizenship Clause of the Fourteenth Amendment. This clause declares that "all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States."[3] For a country of immigrants, this clause ensures all members of the community will be accepted on equal terms.

The Supreme Court decisively rejected the notion that the parent's immigration status of the U.S.-born child limits the universal application of the Citizenship Clause. In explaining the Citizenship Clause, Justice Gray wrote:

> The fourteenth amendment of the constitution, in [the Citizenship Clause] contemplates two sources of citizenship, and two only—birth and naturalization. [C]itizenship by birth is established by the mere fact of birth under the circumstances defined in the constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States and needs no naturalization.

United States v. *Wong Kim Ark*[4] The plain meaning of the 14th Amendment, as well as the Supreme Court's interpretation, illustrates the dubious nature of current proposals to limit birthright citizenship.

Legislative attempts to limit birthright citizenship are flawed

Clearly, birthright citizenship is not the sole manner of acquiring American citizenship. In this respect, Congress does play an important role in citizenship law. As the Court noted, naturalization is an equally important method of welcoming newcomers into the American polity. In addition, a person born abroad to U.S. citizen parents may qualify for American citizenship.[5] Finally, certain historical cir-

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[1] *The Birthright Citizenship Amendment: A Threat to Equality*, Harvard L. Rev., p. 1027, 1994.

[2] Joseph H. Carens, *Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States*, University of Toronto Law Journal, vol. xxxvii, no. 4, fall, 1987.

[3] U.S. Const. amend. XIV § 1. Importantly, this clause abolished the Supreme Court's differential treatment of U.S.-born children of parents who were slaves of African descent. *Scott* v. *Sandford*, 60 U.S. (19 Howard) 393 (1857) (the "Dred Scott" case).

[4] 169 U.S. 649 (1898).

[5] INA § 301 (c) and (g); 8 U.S.C. § 1401 (c) and (g). Thus, notions of *jus sanguinis* (descent from citizen parent) expand citizenship to include those born outside of the United States borders.

cumstances, such as the acquisition of territories, necessitated special citizenship regulations found in the Immigration and Nationality Act.[6]

However, proposals to limit birthright citizenship are constitutionally unsound. H.R. 1363, the Citizenship Reform Act of 1995, attempts to eviscerate the 14th Amendment by creating an artificial meaning of "jurisdiction." H.R. 1363 does so in a circular way by redefining INA § 101, which restates the 14th Amendment's Citizenship Clause.[7] H.R. 1363 adds a subsection to INA § 101 which limits "jurisdiction" to include only those born to a citizen or legal permanent resident parent. Additionally, the bill requires a finding that the parent maintains their residence in the United States. This approach is fundamentally flawed.

The Supreme Court has stated time and again that the 14th Amendment is beyond legislative tinkering. This principle has been broadly declared by the Court:

> [t]he Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

Wong Kim Ark.[8] It was restated more recently in equally compelling terms:

> [the Citizenship Clause] provides its own constitutional rule in language calculated completely to control the status of citizenship: "All persons born or naturalized in the United States * * * are citizens of the United States. * * *" There is no indication in these words of a fleeting citizenship * * * subject to destruction by the Government at any time * * * this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal government, the states or any other government unit.

Afroyim v. *Rusk*.[9] The Court recognized that this concept was originally intended to secure the citizenship of newly freed blacks. However, the Court held that this was a broad concept and that citizenship could not be affected by Congress even under "an implied general power to regulate foreign affairs or some other power generally granted."[10] Therefore, attempts to legislatively change birthright citizenship must fail.

Assuming *arguendo* that the Fourteenth Amendment could be stripped by merely redefining a section in the Immigration and Nationality Act,[11] H.R. 1363 is still constitutionally infirm. The meaning of the word "jurisdiction" is not so manupulable that it can exclude persons not contemplated by its original terms. Rather, *Wong Kim Ark* provides the relevant explanation of "jurisdiction":

> [t]he real object of the Fourteenth Amendment of the Constitution in qualifying the words, "[a]ll persons born in United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words * * * the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State.[12]

The Court, after a lengthy discussion of Anglo-American caselaw, determined that these exceptions were entirely consistent with traditional concepts of American and English citizenship.[13] Further, the Court determined that the framers of the Fourteenth Amendment did not intend to impose any new restrictions upon citizenship or exclude any children born in this country from the citizenship that was their birthright.[14] "Subject to its jurisdiction" was determined to be coextensive and synonymous with "within the jurisdiction" of any State in the Union.[15] Thus, jurisdiction is an expansive concept which cannot be limited artificially by a seemingly simple legislative change.

More recently, redefining "jurisdiction" to preclude conferral of rights has not survived Constitutional scrutiny *Plyler* v. *Doe*. In *Plyler*, appellants argued that a state affords protection only to persons within its jurisdiction. They argued that persons who have entered the United States illegally are not "within its jurisdiction," even

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[6] INA § 301, 8 U.S.C. § 1401.
[7] INA § 301 (a); 8 U.S.C. § 1401.
[8] 169 U.S. 649, 703.
[9] 387 U.S. 253, 262 (1967).
[10] *Id.* at 263.
[11] The Court in *Wong Kim* stated that the Citizenship Clause is "declaratory in form, and enabling and extending in effect." 169 U.S. 649, 676. Thus, it is hard to imagine that the INA was needed to effectuate this Constitutional mandate.
[12] 169 U.S. 649, 682. Note also that one practice manual states that U.S. born children of foreign diplomats are considered to have become permanent residents at birth. *Immigration Practice* § 12–3(a), Michie Publishing Co. (1994).
[13] *Id.* at 682.
[14] *Id.* at 688.
[15] *Id.* at 687.

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if that person is within a state's boundaries and subject to its laws. The Court declared that "neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase 'within its jurisdiction.'"[16] Rather, the Court restated that jurisdiction, as commonly understood, applies to all those within the boundaries of a State. Therefore, H.R. 1363 is legally unsound.

PROPOSALS TO DENY CITIZENSHIP VIOLATES EQUAL PROTECTION PRINCIPLES

In conferring citizenship to the children of freed slaves and reaffirming it for all those born in the U.S., the Fourteenth Amendment in its Equal Protection Clause further mandates that all persons similarly situated be treated alike. The Supreme Court reinforced this notion when it held that the Fourteenth Amendment extends beyond the protection of citizens. *Yick Wo* v. *Hopkins*[17] H.R. 1363 and H.R. 705 violate equal protection principles by treating similarly situated children differently in attaining citizenship.

The notion that a parent's immigration status limits the universal application of the Citizenship Clause was soundly rejected in *United States* v. *Wong Kim Ark*.[18] In this case, the Court held that a child born in San Francisco to Chinese non-citizen parents was an American citizen by virtue of the 14th Amendment's Citizenship Clause. This was despite the fact that the Chinese and other Asians had been excluded by Congress from eligibility for naturalization. While Congress was within its powers to bar the child's parents from naturalization, the Court stated that the 14th Amendment placed the citizenship of native-born children beyond the powers of Congress.[19]

H.J. Res. 64 and the companion legislation H.R. 705, deny citizenship based on the mother's status. Like the Asian parent precluded from conferring citizenship to their child, a mother who is not a citizen or legal permanent resident cannot confer citizenship to their child. Basing citizenship on the parent's status is a clear violation of the Supreme Court holding in *Wong Kim Ark* and raises troubling equal protection concerns.

Discrimination against a discrete class

Discrimination against certain children based on parents' conduct violates equal protection principles. *Weber* v. *Aetna Casualty*.[20] In that case, Louisiana's workmen's compensation law afforded illegitimate children recovery only if surviving dependents did not exhaust the maximum benefits. The Court decided that the State may not invidiously discriminate against this discrete class, illegitimate children, by denying them substantial benefits accorded children generally. Furthermore, the Court refused to allow the state to discriminate against certain children, even when they could be used as vehicles by which to deter or influence the behavior of other persons, such as parents.[21]

Disparate treatment of illegitimate children, not responsible for their birth, violates the general principle that legal burdens should bear some relationship to individual responsibility or wrongdoing and violates the principle of equality. Discrimination against undocumented children, like discrimination against illegitimate children, violates equal protection.[22] In *Plyler* v. *Doe*,[23] the Supreme Court based its decision in part that undocumented children, like illegitimate children, have no control over who they are and should not be discriminated against on this basis. In upholding these children's right to equal access to elementary and secondary education, the Court found that undocumented aliens cannot be excluded from public schools because this discriminated against certain children based on a legal characteristic over which the children have no control. In this regard the Court stated that "[l]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[24] The children of undocumented entrants can affect neither their parents' conduct nor their own status.

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[16] 457 U.S. 202, 212.
[17] 118 U.S. 356.
[18] 169 U.S. 649 (1898).
[19] *Id.* at 694, 701. Legally foreclosing naturalization to certain people based on national origin is not a policy that our country would likely resurrect, nor would it survive constitutional scrutiny.
[20] 406 U.S. 164.
[21] *See also Wallach* v. *Van Riswick*, 92 U.S. 202, 210 (1876) (Decision sought to protect children of persons convicted of treason from loss of inheritance because of their parents' conduct).
[22] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). The Fourteenth Amendment applies to any person within the jurisdiction of the U.S. without regard to nationality.
[23] 457 U.S. 202 (1982).
[24] *Id.* at 220.

Therefore, H.R. 1363, H.J. Res. 64 and H.R. 705 unconstitutionally violate equal protection principles.

DENIGRATION OF AMERICA'S EGALITARIAN TRADITION

Principles of ascription in which inclusion in a policy is the result of objective characteristics have largely governed and must continue to govern United States naturalization law. Ascription is consistent with other American principles of equality in that it treats all people similarly rather than making citizenship a subjective determination of a society influenced by political trends and current events.

Philosophically, basing citizenship on ethnicity or bloodline alone devastates the message of the Constitution. A Constitutional amendment that contradicts the fundamental principle of equality denigrates this value. It also weakens the moral persuasiveness of the Constitution's message of equality.[25] Yet, the equality principle is of paramount importance in our society. Equal opportunity and dismantling artificial barriers to success are core American values. An amendment to limit citizenship erodes the equality principle and mandates a hierarchy of citizenship. The philosophical cost is unacceptable. Legislation proposing a Constitutional amendment, such as H.J. Res. 64 and H.R. 705, must be defeated to protect our core American principles.

Proposals based solely on a theory of mutual consent, are not supported in the totality of American values and principles. Theories of mutual consent which suggests that consent to membership in the United States is by the individual and the existing members of this society are flawed in several respects.[26] Even the authors of this theory recognize the limitations of mutual consent by according birthright citizenship to children of all new and existing members regardless of whether the community has assented. Schuck and Smith justify this exception because no one would join a community if their children could not. This assumes, despite historical and invidious discrimination against certain groups, that the larger whole of the American policy would mutually consent to include their children. This also presupposes that people joining the community are in a position to refuse citizenship if their children would not be accepted. This ignores the economic situation that many immigrants may face which might force them to accept membership into a community although that community would not accept their children. Conversely, this ignores the historical reality that faced many Asians who were not accepted into the American community, and in fact were barred from naturalizing to become full citizens but hoped for a better life for their children.[27]

The American political community encompasses other, more inclusive principles than that of mutual consent. The absence of a hierarchy of citizenship, or differing terms of citizenship based on heritage, and the ultimate inclusion of blacks and others belie this notion of mutual consent as the basis of American citizenship. If other values were not considered, the tension between majoritarianism and minority rights would consistently result in the success of the majority and the exclusion of minority groups. Indeed, if the citizenship clause of the Constituent were based on this theory of mutual consent, it would logically have the left the issue open to ordinary political processes so that citizens could decide whether or not to consent to new membership.[28] Citizenship must not become an ephemeral concept, determined by the popularity of one group versus another. Arbitrary distinctions which form the basis of these bills must be rejected.

Principles of ascription through the Citizenship Clause of the 14th Amendment, enabled the expansion of the community as it has occurred in American political history. It is critical to note that the *Wong Kim Ark* decision[29] is not an example of society mutually consenting to permit persons of Chinese descent into this country. Rather, it is an example of an unpopular group laying claim to a universal and unifying concept of citizenship. By basing citizenship of the objective circumstance of birth in the U.S., the 14th Amendment clearly embodies and must continue to give meaning to principles of equality.

Under such proposals, ethnicity will be legislated as a proxy for outsider status. Disparate treatment based on national origin exacerbates social inequities and threatens the social fabric of the nation. Invariably, Latinos will be considered less

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[25] *The Birthright Citizenship Amendment: A Threat to Equality*, Harvard L. Rev., p. 1027, 1994.

[26] Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent. Illegal Aliens in the American Policy*, New Haven: Yale Univ. Press (1985).

[27] *See Oyama* v. *California*, 332 U.S. 633 (1948).

[28] *Gerald L. Neuman, Back to Dred Scott?*, San Diego L. Rev., vol. 24, no. 2, 1987.

[29] 169 U.S. 649.

than full Americans given the misperceptions that surround immigration.[30] Latino children will be ostracized and subject to citizenship checks more frequently than other Americans solely because of their heritage.[31] Such odious and unintended consequences will surely flow from enactment of this legislation.

In determining inclusion in American society and the symbolism of citizenship, one author has noted the pervasive character of the law.

> Great legal cases have a cultural meaning that goes beyond their particular findings and their precedential power. * * * Both [*Dred Scott* and *Elk*[32]] are compelling reminders of the dark side of American society. * * * By contrast, *Wong Kim Ark* provides one of the few bright spots in American legal history. * * * The case was decided in 1898 at the height of the "Yellow Peril" scare. As the minority opinion shows, there were ways to justify the exclusionary position in legal terms. So the decision in *Wong Kim Ark* stands for the affirmation of the legal rights of an unpopular racial minority in the face of powerful opposition and hostility.[33]

This powerful legacy of our Constitutional jurisprudence and our ideals of citizenship should not be tained by overriding concerns of immigration enforcement.

DENYING BIRTHRIGHT CITIZENSHIP IS AN IRRESPONSIBLE MEANS OF ENFORCING IMMIGRATION POLICY

No evidence supports the view that the amendment would meet its implied goals of reducing undocumented migration. Rather, these proposals manipulate concerns brought to the fore by attempts to reform our nation's immigration system. Credible studies state that the dominant causes of undocumented migration are the hope of obtaining employment or reunifying with family members. To change long-standing notions of citizenship as a means of enforcing immigration law is irresponsible at best and a bizarre attempt to manipulate public sentiment at worst.

Denial of citizenship will create a stateless underclass

The fundamental rights that flow from citizenship have been recognized in our jurisprudence as well as by international scholars. At essence, citizenship confers the right to have rights.[34] In *Dred Scott*, access to the judicial system hinged on citizenship status.[35] In this respect, the Court noted in *Plyler*[36] that the undocumented have been encouraged by some to stay in the US as a source of cheap labor yet denied rights and benefits that society makes available to its citizens and lawful residents.

> The confluence of government policies has resulted in the existence of a large number of employed illegal aliens whose presence is tolerated, whose employment is welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them.[37]

It is not merely the loss of rights that is at stake but the very humanity of the person who is denied a role in the community. Denying citizenship will render powerless an already disenfranchised group of persons. Under these proposals, generations of people will be precluded from joining our community.

For all of these reasons, MALDEF urges Congress to oppose efforts to limit or eliminate birthright citizenship.

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[30] Concerns about the alleged lack of assimilation and allegiance of Asian groups, echoed in today's public debate on immigration, have led to enactment of discriminatory policy. *See Korematsu* v. *U.S.*, 323 U.S. 214, 237 (dissent of Justice Murphy) (discriminatory views giving credence to internment without a *bona fide* military necessity).

[31] For an elaboration of the social impact of such a proposal, *See* John W. Guendelsberger, *Access to Citizenship for Children Born Within the State to Foreign parents*, Am. J. Comp. L. Vol. XL (1992).

[32] *Elk* v. *Wilkins*, 112 U.S. 94 (1884). In *Elk*, a Native American was denied the right to vote because the Court found that he had failed to naturalize. Finding that indigenous Americans owed allegiance to their tribes, the Court held that birthright citizenship was unavailable to Native Americans. Later statutes rectified this situation and Native Americans are now afforded birthright citizenship.

[33] Carens, *supra*, note 2 at 436.

[34] Something much more fundamental than freedom and justice * * * is at stake when belonging to the community into which one is born is no longer a matter of course * * * [and] his treatment by other does not depend on what he does or does not do * * *" Hannah Arendt, *The Origins of Totalitarianism*, 293–302 (1951).

[35] Tellingly, the question that the court decided on was whether a person, born to slave parents, could become part of the political community and enjoy access to commensurate rights. *Scott*, 60 U.S. (19 Howard) 393, 408.

[36] 457 U.S. at 219.

[37] *Id.*

APPENDIX 4—STATEMENT OF RAUL YZAGUIRRE, PRESIDENT, NATIONAL COUNCIL OF LA RAZA

I. INTRODUCTION

Mr. Chairman and members of the Subcommittees, on behalf of the National Council of La Raza (NCLR), the nation's largest constituency-based Hispanic organization, I would like to express our strongest possible opposition to proposals to modify the so-called "birthright citizenship" clause of the Constitution of the United States.

NCLR is an umbrella organization with more than 200 affiliates—community-based organizations throughout the United States who provide services to more than 2.5 million Latinos every year. NCLR has appeared before this committee many times to share our views on immigration-related legislation. We have always been willing to put forward and consider reasonable approaches to immigration control, and have consistently opposed proposals which we believe would be ineffective or harmful to the United States or the values on which it was founded. The question of ending the principle of birthright citizenship in the U.S. fits into both of these categories so strongly as to almost defy explanation.

There are two distinct types of proposals which have been offered on the birthright citizenship question. One type of proposal, sponsored by Rep. Elton Gallegly and others, would amend the Constitution to deny citizenship to U.S.-born children of undocumented mothers. Others, including California Governor Pete Wilson, have called for adoption of similar Constitutional amendments.

A second, statutory form of this proposal has been advanced by Rep. Brian Bilbray. His proposal would amend Section 101 of the Immigration and Nationality Act to deny citizenship to U.S.-born children to: (1) parents who are married and neither of whom are U.S. citizens or lawful permanent residents of the U.S.; or (2) an unmarried mother who is not a citizen or lawful permanent resident or the U.S.

In short, NCLR believes that such proposals are blatantly unconstitutional, ill-conceived, and inconsistent with the nation's values and policy interests—or, in the case of proposed Constitutional amendments, wholly inconsistent with the spirit of the Constitution—for the reasons explained below.[1]

II. PROPOSALS TO MODIFY BIRTHRIGHT CITIZENSHIP ARE INCONSISTENT WITH THE CONSTITUTION

A. Background

Few issues of law are more clearly settled than the simple rule that all persons born in this country are considered citizens of the United States. The Citizenship Clause of the Fourteenth Amendment provides that:

> All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside (emphasis added).

Except for children of diplomats, invading armies, or, for only a brief period of time, Native Americans—i.e, those considered not subject to the jurisdiction of the U.S.—the clause contains no other limitations or equivocations.

In 1898, the meaning of the Citizenship Clause of the Constitution was conclusively determined in *Wong Kim Ark*, when the U.S. Supreme Court rejected arguments that the son of Chinese immigrants—who were then barred by statute from ever becoming U.S. citizens—should be deprived of citizenship due to the status of his parents. Since that time, no court has even questioned, much less denied, citizenship status to any U.S.-born children, regardless of their parents' immigration status.

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[1] See attached memorandum on Representative Brian Bilbray's Proposal to Deny Birthright Citizenship Status to Children of Undocumented Persons prepared for NCLR by the Washington, D.C.-based law firm of Wilmer, Cutler & Pickering.

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Both the statutory and Constitutional amendment approaches to modifying the Citizenship Clause are fundamentally flawed and inherently dangerous to our nation's most sacred values, for a wide variety of reasons, as suggested below.

B. Statutory approaches

Rep. Bilbray's proposal attempts to redefine the terms "subject to the jurisdiction [of the United States]" to exclude persons other than citizens of lawful permanent residents. In light of the history of the Citizenship Clause, this approach is legally erroneous and clearly unconstitutional.

First, this attempt to reinterpret and circumvent the plain language and legislative history of the Fourteenth Amendment contravenes every credible interpretation of the Citizenship Clause. Contrary to Rep. Bilbray's assertion that the Fourteenth Amendment applied exclusively to newly-freed slaves, the legislative history reinforces the intent of the Clause's reference to all persons, including the intent to extend citizenship rights more broadly to "the alien and the stranger."

Second, the statutory approach contravenes the Fourteenth Amendment's clear intent to promote the equal protection of the law. This is true on a whole range of levels, as demonstrated below, but perhaps most clearly demonstrated in the following way. Were this Congress to enact, and were the courts to uphold, H.R. 1363, we would be stating in effect that the legislature could, by statute, define human beings who are physically present in the United States as non-persons—entitles who fall outside the scope and protection of the U.S. Constitution.

Third, by explicitly defining everyone in the country who is not a citizen or lawful permanent resident as being outside "the jurisdiction of the United States," H.R. 1363 could create a number of perverse and untenable situations. We are all aware of the occasional tensions that arise when, for example, foreign diplomats do not abide by our laws and are held by the courts to be immune from prosecution. Rep. Bilbray's proposal would place all of those U.S. residents who are neither citizens nor lawful permanent residents in this same category. Does he intend that such persons be considered exempt from paying taxes, registering with the Selective Service and serving in the armed forces during wartime, or even paying parking tickets?

Fourth, H.R. 1363 is so narrowly written that the children of many persons who are lawfully present in the United States would be denied citizenship. There are hundreds of thousands of persons legally here, including refugees and asylees, those in temporary protected status, temporary workers, and parolees who are not now permanent residents. H.R. 11363's restrictive language is thus flawed on two levels. On one level, it would deny citizenship to the children of many who are lawfully present in this country; this seems to be in direct contradiction to the legislation's stated purpose. Just as importantly, it fails to recognize the fact that many, and perhaps most, of these people will eventually obtain permanent resident, and even citizenship, status. Thus, on another level, H.R. 1363 could, even within the same family, create two different classes of citizenship for U.S.-born children. Consider the following example if H.R. 1363 were enacted:

> John, a lawful permanent resident from Ireland, falls in love with and marries Zoon, a recently-arrived refugee from Southeast Asia. Their first child, John Jr., is born 11 months after Zoon's arrival and 10 months after their marriage. Because Zoon will not yet have been permitted under our laws to adjust to permanent resident status, John Jr. is not considered a U.S. citizen. A year later, their second child, Kim, is born. By that time, Zoon has obtained permanent resident status, so Kim is a U.S. citizen. The effect on these two siblings, born just one year apart: same parents, same family, same place of birth—but different citizenship.

Mr. Chairman, I cannot imagine a less desirable and more perverse result than that described above, but if H.R. 1353 were enacted, it would not only be possible, it would be inevitable—unless, of course, we also outlaw sex or marriage between citizens or permanent residents and anyone who is not a citizen or permanent resident.

C. Constitutional approaches

Unlike the statutory approach, those who advocate a Constitutional amendment, like that proposed by Rep. Gallegly, at least do not attempt to circumvent the Constitution. Like the statutory approach, however, proposed Constitutional amendments are inconsistent with the fundamental values espoused by our Constitution, our nation, and, indeed, our civilization.

Modifications of the concept of birthright citizenship undermine the principle of equality before the law by overturning the centuries-old doctrine that children are not responsible for their parents' actions. One need look no further than the Bible, which in Ezekiel 18:20 states that "the son shall not bear the iniquity of the father,"

for affirmation of the principle that innocent children should not be punished for the sins of their parents. Article III of the Constitution itself established the principle that similarly situated children—even those children whose parents had been convicted of treason—should be entitled to their inheritance.

Since then, an unbroken series of Supreme Court cases has found, for example, that legal distinctions based on immutable characteristics such as race, gender, illegitimacy, or immigration status are subject to heightened scrutiny, and are generally impermissible. The Court found that all illegitimate children, for example, were entitled to equal protection in *Levy* v. *Louisiana*. In *Trimble* v. *Gordon*, the Court struck down a law that denied illegitimate children their inheritance. In *St. Ann* v. *Palisi*, the Court held that children could not be suspended from school because of the inappropriate conduct of their parents. In *Weber* v. *Aetna Casualty and Surety Co.*, the Court found that "no child is responsible for his birth."

This principle has been applied explicitly in the immigration context as well. In *Oyama* v. *California*, the Court overturned a law that placed barriers to land ownership by minors whose parents were ineligible for citizenship. In this case, the Court held that the law was unconstitioanl because it "points in one direction for minor citizens * * * whose parents cannot be naturalized, and in another for all other children." Finally, in the case of *Plyler* v. *Doe*, the Court found that although certain benefits could be denied to undocumented aliens, the notion that unlawful status could justify unequal treatment could not be applied to their innocent children.

And it is not just the "innocent children" doctrine which these amendments would undermine. Mr. Chairman, the entire concept of equality before the law would be invariably and perhaps irretrievably compromised. In discussing proposals to amend the birthright citizenship clause, the *Harvard Law Review* commented that:

> No amendment to the Constitution has ever aboraged existing rights arising from the equality principle; to adopt one that does offend equality would sully the document, and would cast doubt upon the resolve of the polity to safeguard this value * * * How can society tell its immigrants, its minorities, and disadvantaged that, regardless of one's origins, everyone has a fair chance at success and social acceptance, when through the Constitution, it erects barriers against a class of innocent children (emphasis in the original).

These proposals undermine other important principles as well. For example, by limiting citizenship only to those children with citizen or lawful permanent resident mothers, these proposals blatantly violate the rights of the father. Under the proposals, even a child of a U.S. citizen father who could indisputably demonstrate paternity—indeed, even a child of a citizen father who assumed all parental obligations and responsibilities—would not be considered a citizen if the mother was not a citizen or permanent resident at the time of birth.

Furthermore, the proposals before us would have the Constitution revert back to the days of the infamous *Dred Scott* decision, when the law of the land sanctioned the exclusion of particular groups, in this case native-born African Americans, from full participation in the society and the full protection of the law. By injecting concepts of lineage and ancestry into the Constitution, we would undermine that document's century-old commitment to the principle of equality before the law.

And once we abandon this cherished principle of equality in our Constitution, what's next? Will we eliminate the citizenship status of certain religious groups, as was done in Nazi Germany? Will we deny citizenship to the children of teenage mothers on welfare, or those of unpopular ethnic groups, or those of persons with AIDS, or those of convicted criminals?

Even worse, would we then be positioned to deny the protections of the U.S. Constitution to such unpopular groups, as the Court did in *Dred Scott*, by declaring that members of such groups are not "persons" under the law?

Let me be clear on this point. I do not argue that the current-day proponents wish these results. I do argue that, by explicitly overturning the Fourteenth Amendment's legal and moral commitment to the principle of equality before the law, these proposals open the door to all sorts of mischief, unintended consequences, and unacceptable outcomes.

III. PROPOSALS TO MODIFY THE BIRTHRIGHT CITIZENSHIP CLAUSE ARE UNACCEPTABLE ON POLICY GROUNDS

A. Overview

Proponents of these proposals argue that they would merely bring U.S. law into line with that of other countries. They further argue that they will reduce illegal immigration. Finally, they suggest that adoption of these proposals will somehow promote greater unity in the United States.

None of these assertions is true. Moreover, these proposals would lead to a series of unacceptable and undesirable—if perhaps unintended—policy outcomes as well.

B. Policy effects

The assertion that U.S. law on birthright citizenship is somehow out of line with prevailing practices elsewhere in the world is simply untrue. A recent survey of the citizenship laws of 33 other countries found that only eight restrict application of birthright citizenship based on immigration status of the parents, and none based such restrictions solely on the immigration status of the child's mother.

With respect to the proposals' alleged effects on illegal immigration, I note three issues. First, none of the proponents cite a single empirical study demonstrating any significant effect of their proposals on illegal migration. Indeed, these same proponents are fond of arguing that jobs, or welfare, or some other condition serves as a "magnet" for illegal immigrants. They should make up their minds which, if any, of these constitute real "pull" factors encouraging migration into the United States.

Second, proponents are fond of citing "studies" which allegedly demonstrate significant numbers of U.S.-born children of illegal immigrants. When social scientists have reviewed these "studies," they have found that they have "absolutely no foundation." A recent General Accounting Office (GAO) report confirmed that hospitals reporting these statistics were relying on flawed methodologies.

Third, the one indisputable effect of these proposals would be to *increase* the size of the undocumented population in the U.S. Since children born to non-U.S. citizen, non-permanent resident mothers would presumably be undocumented, the size of this population would grow in direct proportion to the significance of the alleged problem.

As for the assertion that somehow these proposals would promote unity and reduce social costs associated with undocumented immigration in the U.S., I can only comment that nothing could be more false. A whole series of commentators have, indeed, found the opposite; as the *Harvard Law Review* notes, "the amendment would cause the negative social effects of such a permanent underclass of residents to proliferate, rather than dissipate."

Furthermore, I would note that, those few countries which do restrict citizenship based on immigration status—like France and Germany—have experienced race riots and social unrest on a massive scale. In fact, in an attempt to dispel the commonly-held popular notion that all ethnic minorities are "foreigners," Germany's Christian Democratic Party is promoting the greater provision of citizenship to non-ethnic Germans.

Moreover, if anything would be more divisive and discriminatory than yet another proposal to separate people based on their ancestry, I cannot conceive of it. After the 1986 Immigration Reform and Control Act (IRCA) and employer sanctions, GAO documented a "widespread pattern" of employment discrimination, because some employers mistakenly thought all persons who looked or sounded "foreign" were undocumented aliens. After Proposition 187, a fast food restaurant refused to sell U.S. citizen teenagers a pizza because they were Latinas. If current welfare proposals are adopted, children will have to form different lines in the school cafeteria, based on their immigration status. I tremble at the thought of how some people are likely to treat newborn babies if these proposals are adopted.

To those who might suggest that I exaggerate, let me recount a bit of history. In the 1980s, Congress debated and passed IRCA designed to stop undocumented immigration. Some of us argued that eventually this legislation would have a "spillover" effect, and would end up targeting all of us—immigrant and citizen alike—who look or sound "foreign." We argued that this legislation would lead to calls for even more repressive measures, like national identification systems.

Our opponents accused us of demagoguery and worse. In the wake of a series of independent reports that confirm that many of us have experienced discrimination as a result of IRCA, this very Congress will soon consider legislation and floor amendments to establish a "worker registry" and a national ID card.

During the debate on Proposition 187, many of us argued that it would eventually harm all immigrants and those of us, including citizens, who had surnames, or speech accents, or physical characteristics that some view as "foreign."

Proponents scoffed at this notion, and argued vociferously that they intended no harm to legal immigrants or U.S. citizens. Now, this very Congress passed legislation denying benefits to legal immigrants and certain U.S. citizens.

I warn you today that these proposals will undermine our nation's commitment to equality under the law. I warn you today that these proposals will lead us down the proverbial slippery slope toward a nation whose laws permit distinctions based on ancestry, on race, on ethnicity, on gender, and other immutable characteristics. I warn you today that these proposals will not do anything to reduce unauthorized

migration, but instead will increase the size of the undocumented population. Finally, I warn you that these proposals will lead to enormous discrimination and social strife.

You may, if you wish, accuse me of demagoguery or worse. You may scoff at my predictions. You may choose not to heed my warnings. Let me note in reply that, as it pertains to these issues, we have been right, and our opponents have been wrong.

IV. CONCLUSION

Mr. Chairman, in conclusion, permit me to raise two final issues. Even if the Subcommittees were not persuaded by the fact that these proposals violate the Constitution and would not achieve their intended policy consequences, I suggest they should still be rejected.

One reason they should be rejected is that they are inconsistent with the values which the majority of the Congress claims to uphold. At a time when the leadership of the Congress is arguing that government has grown too large, too unwieldy, and too intrusive, I am shocked that these proposals would be seriously considered. What could possibly be more intrusive than to inject the hand of the government into the most sacred of human situations—the birth of a child? What could possibly be more intrusive than injecting the government into the bedroom, and to decide that the rights of a child's father are irrelevant? We may be getting the government off our backs, but these proposals would put the government into our delivery rooms and even our bedrooms.

And to those who hold the belief that life begins at conception, how can you reconcile that belief with the notion that only the status of the child's mother at the time of birth matters? Under Governor Wilson's proposal to provide citizenship to any child whose parents are "lawfully present" in the U.S., there will be many children who are conceived while their parents are in lawful status—such as those in temporary protected status, or those with temporary work permits, or asylum applicants whose claims are later rejected—but whose parents may be in undocumented status at the time of birth. Would those who hold the "pro-life" position have us believe that life begins at conception only if the parents are also in lawful status at the time of birth? And if so, does that mean that abortions for those in the U.S. illegally should be the only ones available under out laws? Surely not.

Finally, as those of us who opposed Proposition 187 argued—in retrospect correctly—these proposals, like that ill-conceived ballot proposition, will lead only to greater public frustration and anger. Whatever one thinks about the intent of Prop. 187—and I know reasonable people disagree—opponents made at least one argument which is undeniably true. We noted that elements of this proposition were of dubious constitutionality, and would inevitably be tied up in litigation for many years. We argued that passage of Prop. 187 would therefore do nothing to address the question of immigration control in the foreseeable future. We argued that the public would become more angry and frustrated when the inevitable—and successful—court challenges prevented its implementation.

Mr. Chairman, I repeat those arguments today with respect to these proposals. In the case of H.R. 1363, everyone in the room knows that it will inevitably be challenged and successfully enjoined in the courts for many, many years, at best, even in the extremely unlikely event that it is eventually upheld.

In the case of the Constitutional amendments, everyone in the room knows that Congressional action would be protracted and fractious, and the ratification process equally if not more so. In any event, the process would take years.

In short, these proposals are a sham. Some Members will get some attention. Some Members will go home and say they did something to be "tough" on immigration. In the meantime, Mr. Chairman, you would have passed another divisive proposal that would have done nothing whatsoever to affect undocumented migration.

Let's have some truth in government here. I urge you in the strongest possible terms to reject these proposals and move on to the real work of crafting real legislation that promises real solutions.

APPENDIX 5.—LETTER DATED FEBRUARY 12, 1996, FROM PROF. PETER H. SCHUCK AND PROF. ROGERS M. SMITH, YALE LAW SCHOOL

YALE LAW SCHOOL,
New Haven, CT, February 12, 1996.

Hon. LAMAR S. SMITH and Hon. CHARLES T. CANADY,
Subcommittee on Immigration and Claims and Subcommittee on the Constitution; Committee on the Judiciary, Rayburn House Office Building, U.S. House of Representatives, Washington, DC.
Attn: George Fishman.

DEAR CHAIRMEN SMITH AND CANADY: As discussed with your staff, we ask that this letter be added to the published record of the hearing held on December 13, 1995 on the subject of birthright citizenship. The letter responds to Professor Gerald Newman's criticisms of our book, *Citizenship Without Consent*, in his written statement at the hearing. Our response is confined to the *constitutional* issue, which is the only point—albeit an important one—on which we and Professor Neuman differ. We shall be brief and touch on only those points that might not be obvious to a careful reader of Professor Schuck's earlier testimony.

The crucial question that divides Professor Newman and us is this: what theory of the meaning of the Citizenship Clause best explains how the Framers would have viewed its application to the native-born children of illegal aliens? To be adequate, such a theory must make sense of (1) the ambiguity of the Clause, particularly the limiting phrase "subject to the jurisdiction thereof," (2) the general principles of membership and consent to which the Framers were committed; and (3) the fact that although they never considered how those principles would apply to the then non-existent category of illegal alien, they did make a specific decision to deny constitutional birthright citizenship to American Indians, a group with a stronger claim to it than illegal alien children have ever had. Our theory meets this challenge; Professor Neuman's does not.

Scholars can reasonably differ in their interpretations of the Citizenship Clause for two reasons. The first reason is that today we attempt to apply the Clause to a group the framers never considered: Children of persons present in the U.S. in violation of federal law. The second reason is that the language of the clause was ill-designed to accomplish the purposes that, all scholars agree, the Framers shared. They wished to make the citizenship of American-born blacks secure by constitutionalizing the common law rule of *jus soli*, citizenship by place of birth. They were prepared to accept that this rule made citizens even of people still ineligible for naturalization, including persons of Chinese decent and Africans born outside the United States. They emphatically did not wish to extend birthright citizenship to persons born into the Indian tribes.

The language they chose to exclude Indians from constitutional citizenship was that it would not extend to persons who were not born "subject to the jurisdiction" of the United States. That phrase did not do the job well, however, because even though the U.S. recognized the tribes as "dependent nations," it still claimed and often exercised sovereignty over their lands and conduct. In this very crucial sense, the Indians were "subject to the jurisdiction" of the U.S.

The Framers simply did not articulate a theory that explains how their words would accomplish their goals in consistent fashion, much less one that explains how they would have regarded the status of today's illegal aliens. It is thus not surprising that scholars differ on how to interpret the Clause and how to apply it in contemporary circumstances. We believe that our interpretation is the most coherent response to these difficulties.

Neuman interprets the "subject to the jurisdiction" phrase as meaning "actual subjection to the lawmaking power of the United States," and he thinks that this standard accomplished the Framer's intent to exclude the native tribes. But in 1868 the U.S. had already repeatedly asserted and exercised its professed right to legislate over the tribes in many regards, especially their disposition of their lands. In 1871, a Congress that contained many Framers of the 14th Amendment adopted the policy of always legislating over the tribes directly rather than ever dealing with

them by treaty (16 Stat. 544 (1871)). But Congress took this step as a matter of new policy, not new power. It never doubted their authority to legislate over the tribes. Neuman's reading does not explain, then, how the "subject to the jurisdiction" limitation excluded the tribes from birthright citizenship.

The Framers did provide an imperfect but suggestive answer. They defined the status of the tribes as "dependent nations," a category that they drew from the international law writer Emmerich de Vattel, whose ideas (so the Supreme Court later noted in *Wong Kim Ark*, 169 U.S. 649 (1898)) had influenced the Framers. It was also a category that Chief Justice John Marshall had used to characterize the tribes. *Cherokee Nation* v. *Georgia*, 5 Peters 1, 16–17, 20 (1831). Vattel said that such "dependent nations" had consented to give up a portion of their sovereignty in return for protection from a greater power, which thus exercised a measure of sovereignty over them. By exercising that sovereignty, however, the more powerful nation had not consented to make them full members of its own political society. Although this understanding of political membership as resting on consent was consistent with influential understandings in American legal and political discourse tracing back to the Declaration of Independence's contention that just governments derive their authority from the "consent of the governed," The Framers used the "subject to the jurisdiction theory" phrase to limit the effect of the *jus soli* common law rule that they otherwise evaded.

Professor Neuman emphasizes a passage from the *Wong Kim Ark* decision in which the Supreme Court noted that the Indian tribes stood "in a peculiar relation to the National Government, unknown to the common law. . . ." But if the tribes were "unknown to the common law" and were thus excluded from constitutional citizenship, illegal aliens were even more so, as the common law, which did not impose immigration restrictions, did not even recognize such a category.

Professor Neuman argues that our position is circular because it requires that the U.S. consent to an individual's status "as a citizen." If that were our position, it would indeed be circular, but that is not our position; we say only that the U.S. must consent to the individual's permanent legal presence in the U.S. in order to make that person "subject to the jurisdiction thereof." Professor Neuman also accuses our theory of circularity because (he says) it relies on the same evidence to bestow constitutional citizenship on the native born-children of legal permanent residents as it does to deny that status to temporary visitors' and illegal aliens' children. But our evidence on the status of the children of legal permanent residents could not be clearer; the Framers specifically discussed the children of Chinese and other permanent residents and clearly indicated that the Clause would render them birthright citizens.

Finally, Professor Neuman says, incorrectly, that our position is that the "subject to the jurisdiction thereof" clause covered only those aliens who owed "no allegiance" to any other sovereign. In fact, the Framers distinguished (in the passages that we cite in our book, to which Professor Neuman's testimony refers) between aliens who retained their original allegiance but subordinated it in order to live more or less permanently in an American community that had accepted them into it, and those who had not subordinated their original allegiance but were nonetheless subject to U.S. jurisdiction in decisive respects. The latter group, which included Indians born in the tribe (but not those born "in white society," a distinction later drawn by the Supreme Court in *Elk* v. *Wilkins*, 112 U.S. 94 (1884), were not "subject to the jurisdiction" of the U.S. within the meaning of the Clause. We continue to think that the absence of mutual consent to their presence and status makes illegal aliens more similar to tribal Indians than to Chinese legal resident aliens with respect to the applicability of the "subject to the jurisdiction thereof" limitation on birthright citizenship.

We thank you for this opportunity to set the record straight.

Sincerely

PETER H. SCHUCK.
ROGERS M. SMITH.

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